IN THE SUPREME COURT
OF THE STATE OF FLORIDA

MERRIT ALONZO SIMS, Appellant, -vs- STATE OF FLORIDA, Appellee.	)	Case No. SC04-1879 Lower Tribunal No. F91-22048 On Appeal from the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida.

AMENDED INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves an appeal from the Circuit Court's denial of Rule 3.850 relief, as well as various rulings made during the course of Mr. Sims' request for post-conviction relief. References to the trial and post-conviction records are as follows:

Original Trial:	(T. __)
Materials in record of direct appeal:	(ROA Dir. __)
Post-Conviction Record of Appeal (including transcript of February 2003 Evidentiary Hearing):	(ROA __)
Defendant's Exhibits from Feb. 2003 Hearing:	(DX __)

The transcript of Mr. Sims' trial, along with the other materials in the Record of Appeal of Mr. Sims' direct appeal, have been made part of the record on the instant appeal.

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STATEMENT OF THE CASE

The challenged judgments of conviction and sentence were entered by the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida. Mr. Sims was indicted on July 17, 1991 for the first degree murder of Charles Stafford, a Miami Springs police officer. (ROA Dir. 1). Mr. Sims was also indicted on the charges of armed robbery and possession of a firearm by a convicted felon.[1] He was tried before a jury on January 3 through January 12, 1994. Mr. Sims pled not guilty and testified on his own behalf at trial, contending that he acted in self-defense in response to Officer Stafford's use of grossly excessive force, accompanied by racial slurs and unprovoked death threats, during a traffic stop on State Road 112 in Miami.

After four hours of deliberation, the jury convicted Mr. Sims of first degree murder and armed robbery. The date of the judgment of conviction is January 12, 1994. (T. 1478).

The penalty phase of Mr. Sims' trial was conducted on February 4, 1994. (T. 1484). The entire hearing lasted a total of three hours. The jury recommended a death sentence by a vote of 8 to 4. (T. 1600). On March 18, 1994, the court held a *Spencer* hearing during which no evidence or substantive argument

[1] The last charge, possession of a firearm by a felon, was severed before the trial.

was presented. (T. 1609). The trial court sentenced Mr. Sims to death on the same day. (T. 1611).

On direct appeal, this Court affirmed the conviction and sentence. *Sims v. State*, 681 So.2d 1112 (1996). Defendant's motion for reargument was denied on October 24, 1996. The United States Supreme Court denied Mr. Sims' petition for a writ of certiorari on April 27, 1997.

On April 8, 1998, Mr. Sims filed in the Circuit Court a Motion to Vacate or to Set Aside Judgment and Sentence Pursuant to Florida Rule of Criminal Procedure 3.850. The same day, Mr. Sims also filed a Motion to Disqualify Judge Carney from Presiding Over Petitioner's Rule 3.850 Motion and Related Proceedings. (ROA 83). The Motion to Disqualify was denied on December 21, 1998. (ROA 242).

In June 1999, Mr. Sims filed an Amended Motion to Vacate or to Set Aside Judgment and Sentence Pursuant to Florida Rule of Criminal Procedure 3.850 ("Amended Motion"). (ROA 257). In August 1999, Mr. Sims filed a Renewed Motion to Disqualify Judge from Presiding Over Defendant's Rule 3.850 Motion and Related Proceedings. (ROA 358). The renewed motion was denied on March 16, 2000. (ROA 386).

On July 14, 1999, the trial court held a *Huff* hearing pursuant to Florida Rule of Criminal Procedure 3.851(c). (ROA 368). The court issued a

decision on January 4, 2000, denying an evidentiary hearing except for three of the issues raised in Mr. Sims' Amended Motion: "(1) Failure to investigate and present mitigation evidence; (2) Failure to retain a mental health expert and timely obtain other witnesses; (3) Failure to allege to the jury that if defendant were sentenced to life, he would allegedly never be eligible for parole." (ROA 388).

On July 16, 2002, Mr. Sims filed a supplement to his Amended Motion to vacate sentence based on the United States Supreme Court's decision in *Ring v. Arizona.* (ROA 789).

On February 18-19, 2003, the trial court held an evidentiary hearing on the three issues identified in its January 4, 2000 Order. Following the evidentiary hearing, on April 15, 2003, Mr. Sims filed a Post-Hearing Memorandum in support of his Amended Motion. (ROA 844).

On July 30, 2004, the trial court issued a decision denying the Amended Motion in its entirety. (ROA 926). This appeal followed.

STATEMENT OF FACTS

Mr. Sims was represented at trial by two state-appointed attorneys, Clinton Pitts and Arthur Carter. Pitts had primary responsibility for the guilt/innocence phase of the trial. Carter had exclusive responsibility for the penalty phase. (ROA 1171).

I. FACTS PERTINENT TO INEFFECTIVE ASSISTANCE AT THE GUILT/INNOCENCE PHASE OF MR. SIMS' TRIAL

The basic sequence of events in this case – including the fact that Mr. Sims shot and killed Officer Charles Stafford following a traffic stop on June 11, 1991 – was not disputed. Rather, Mr. Sims testified on his own behalf that Stafford's violent choking and verbal threats put him in fear of his life, and that he desperately grabbed Stafford's gun and shot Stafford with it in self-defense.

A. The Events of June 11, 1991

On June 8, 1991, Mr. Sims and his cousin, Sam Mustipher, attended the Goombay Festival in Miami together in Mustipher's car, a white Cadillac Coupe de Ville. (T. 908). Later that day, Mustipher went home and lent Mr. Sims the car (T. 914-15, 1226), without putting any time limit on how long Mr. Sims could keep it. (T. 922-23).

Two days later, however, Mustipher reported the car stolen because he had not heard from Mr. Sims and was concerned about him.[2] (T. 916). At approximately 8:45 p.m. on June 11, while on duty in his patrol car, Officer Stafford noticed Sims driving the Cadillac and had the tag number checked. (T. 952-53). As a result of Mustipher's report, the police dispatcher advised Stafford

[2] Mustipher later told the police that Mr. Sims had not stolen the car. (T. 923). At trial, Mustipher could not explain why he reported the car stolen when he had voluntarily lent it to Mr. Sims: "[S] omething in me just said call the police and report the car stolen." (T. 923).

that the car was stolen. (T. 947). On Stafford's direction, Mr. Sims pulled the car over and stopped on the exit ramp from State Road 112 to N.W. 27th Avenue. (T. 1229). Stafford stopped his car about three feet behind the Cadillac. (T. 1229).

Mr. Sims testified at trial that he then got out of the car and stood between the two vehicles. (T. 1229-30). Mr. Sims was 5'8" and 180 pounds, whereas Stafford stood over 6 feet tall and weighed over 250 pounds. (T. 1233 (Sims); (T. 1218) (Stafford)). Stafford opened the door of his car and ordered Mr. Sims to put his hands on the car, then stepped out of the car with his gun drawn, saying to Mr. Sims: "I thought you was going to run. You going to run? You want to run?" (T. 1230). Mr. Sims responded, "I don't want to run. From what? I don't want to run." (T. 1230). Stafford continued to menace Mr. Sims:

> And he continued, he stepped around the door and he begun to come at me. And he was looking at me and pointing the gun in an angry manner; he had a look on his face that was like frightening me.
>
> So as he steps toward me, the next thing he says, "You niggers like to steal Cadillacs."
>
> I said, "No, sir. This is my cousin's car."
>
> As he began to come toward me, he was frightening me, so I began to back up. . . .
>
> Because the way he was pointing the gun at me, it's like he wanted to shoot me or something. So I didn't want to give him any reason. I wanted to show my hands at all times. And as I was backing up, I was trying to explain the reason I didn't stop and this is my cousin's car. And I am explaining myself to him because the words he's saying to me, "You like to steal cars, huh, boy?"

> And I was saying, "This is my cousin's car." And he said, "Don't lie to me."

(T. 1230-31). Mr. Sims testified that he "turned away and looked up in the sky" because "it was like if [Stafford] hated me" and he "thought [Stafford] was going to shoot me." (T. 1231-32). Mr. Sims testified that next:

> I felt a blow to my mouth, and then I felt a hand go around my throat. … [I] tried to get the hand off me when he first did it. I tried to look at him, and I couldn't because of the position of my head. … When he went to put pressure on me, I couldn't breathe. So I went to try and get his hand off from around my neck, and I was moving all the time, trying to back out of it, but I couldn't. … [H]e was too big, I couldn't get him off me. And he had me pinned against like the side panel of the car, and his hand was across my neck. I couldn't breathe.
>
> Q: What do you think he was trying to do to you at that point?
>
> A: Trying to kill me. I couldn't breath and he wouldn't stop.

(T. 1232-33). With Stafford choking him, Mr. Sims "just frantically started reaching, moving my hand." He grabbed Stafford's radio and "swung overhand and hit him somewhere in his head. And when I did that, he let me go." (T.1233).

Once free, Mr. Sims immediately turned around and put his hands in the air so that Officer Stafford could take him into custody. (T. 1234). But Stafford, now infuriated, said: "'You're fucking dead. You're one fucking dead nigger. You're fucking dead, boy.'" (T. 1234). Stafford grabbed Mr. Sims on the back of the neck and aimed his gun at Mr. Sims' head (T. 969):

> And I was crying at the time, saying, "Sir," you know, "don't kill me. Just take me to jail. The only reason I hit you is because you was choking me, I couldn't breathe."

(T. 1234) At that point, "a car came off the expressway, and when the car came off, I was still – I was crying, hollering out. I said, 'Sir, just don't kill me. Take me to jail.'" (T. 1235). Stafford put his gun back in its holster. (T. 969). After the car passed by, Stafford put Mr. Sims' wrist in handcuffs and began squeezing the cuff with such force that Mr. Sims dropped to one knee in pain. (T. 1235-36).

Stafford then put his arm around Mr. Sims' neck in a chokehold, lifting him up by the neck and repeating "'You're fucking dead, boy.'" (T. 1237). Unable to breathe, Mr. Sims again frantically flailed about, reaching back "to get something and hit him, try to hit him and make him stop choking me." (T. 1237). Mr. Sims testified that "I reached back, and I was just reaching for anything. … I just grabbed something." Mr. Sims later realized that he had grabbed Stafford's gun. (T. 1238).

After Mr. Sims grabbed the gun, Officer Stafford released Mr. Sims momentarily, then immediately charged at him in a bent-over, "down position," with his hands up. (T. 1238). Impulsively, Mr. Sims put his "hand out to try and stop [Stafford] from getting to me. And I heard an explosion and the gun went off. … I heard one explosion then, and he didn't stop. He just kept coming at me. And by the time he put his hands on me, it went off again one or two more times." (T.

1238). Officer Stafford fell back. In a state of panic, Mr. Sims jumped into the car and fled, almost running into another car. (T. 1239-41).

The only other eye-witness testimony introduced at trial concerning the above events was consistent with and partially corroborated Mr. Sims' account. Farid Batule, a *Miami Herald* employee, testified that he was the driver of the car that, as Mr. Sims testified, "came off the expressway" and drove slowly by the scene as Stafford was pointing his gun at the back of Mr. Sims' head. (T. 963, 974-75; T. 1235). As Batule maneuvered around the police car, he saw Officer Stafford with his left hand on the back of Mr. Sims' neck, his right hand holding a gun and moving it back and forth towards Mr. Sims' head. (T. 966-687). Stafford had a red "dot" on his forehead and blood on his face. (T. 969-70). Batule further testified that he heard Mr. Sims cry out, in an "emotional plea": "Okay, you got me man." (T. 969, 976). Upon seeing Batule, Stafford returned the gun to his holster. (T. 968, 1236). Batule continued down the exit ramp and left the scene.

Batule was waiting at a red light on 38th Street when the Cadillac ran the light at a high rate of speed. (T. 970-71). After leaving the scene, Mr. Sims looked unsuccessfully for his cousin, then drove to a park and threw the gun in the river. (T. 1242). Thereafter, he parked the car, balled himself up, and sobbed until he fell asleep. (T. 1242). The following day, he boarded a bus to Sacramento, California, where two of his children lived whom he wanted to see before turning

himself in to police. (T. 1245). Mr. Sims was arrested in Sacramento on June 17, 1991. (T. 1179).

B. The State's Reliance on a Theory of Purported Motive Based Evidence of a "Dog Alert"

Mr. Sims was indicted on July 17, 1991 for first degree murder, armed robbery, and possession of a firearm by a convicted felon. (ROA Dir. 1-3). Lacking any eye-witness testimony to refute Mr. Sims' account of the events of June 11, the prosecution instead sought to counter Mr. Sims' defense at trial by offering a theory of motive – namely, "that the reason for the murder of Officer Stafford is that the defendant was transporting drugs at the time." (T. 385). The State disclosed this theory in pretrial motions and in argument before the Court prior to trial, on January 3, 1994. (ROA Dir. 229).

The State's theory that Mr. Sims was transporting drugs on June 11 was predicated upon evidence that a trained dog had "alerted" to the scent of narcotics on the front seat of Mustipher's Cadillac, during a search of the car two full days after the shooting. In addition, the prosecution called Mr. Sims' parole officer, Essie Lynn, to testify that Mr. Sims was on control release at the time of the shooting on June 11, and that he was aware that the possession or transportation of narcotics would violate a condition of his release. (T. 1107-09).

As this Court noted in its decision on Mr. Sims' direct appeal, Mr. Sims' attorneys "neither objected to the admissibility of the testimony regarding

the dog-alert nor did [they] seek to strike that testimony when it became apparent that the trial court was going to permit the state to use Lynn's testimony to prove that Sims was on parole and that he knew drug possession was a parole violation." *Sims v. State*, 681 So.2d 1112, 1115 (Fla. 1996); *see also id*. n.5.

At trial, Officer Scott Silva of the Metro Dade Narcotic K-9 Unit testified that he conducted a search of the Cadillac with his dog "Jake" in the evening of June 13, 1991. Officer Silva provided no testimony regarding the dog's training or reliability, stating only that Jake had "gone out with [him] in order to detect the scent of" narcotics "[t]housands of times" over the previous six years. (T. 1081). Silva further stated that he had previously testified "[s]everal times in State Court and at least eight times in Federal Court" concerning Jake's "alerting or not alerting to certain items." (T. 1082). On cross-examination, Mr. Sims' counsel did not ask a single question concerning either Silva's prior testimony or Jake's training or reliability. (T. 1088-89).

Silva testified that Jake did not alert to the exterior or the trunk of the Cadillac, nor did he alert on his first pass through the interior of the car. (T. 1084-85). Only on his second pass through the passenger compartment of the car did Jake "alert" to the front passenger seat, at the junction to the seat and back. (T. 1085). Silva conceded, however, that no "measurable amount of narcotics" or contraband of any kind were found in the car. (T. 1087). He further acknowledged

that he could not identify *when* the narcotics were present in the car, stating that "there is no way to tell" when the narcotic that prompted Jake's alert was actually in the car. (T. 1087). Despite the above testimony, Mr. Sims' counsel never made any objection nor any motion to strike the testimony or prevent the jury from considering it.

C. The Prosecutor's Improper Remarks In Closing Argument to the Jury

In its closing argument, the prosecution repeatedly emphasized its theory of motive based on the dog-alert and parole-status evidence, contending that Mr. Sims had drugs in Mustipher's Cadillac and murdered Officer Stafford to avoid being caught in violation of his parole. (*See* T. 1419-20, 1422, 1435-36, 1440). The prosecutor asserted: "There is a difference in if you have some drugs in the car and you're going to be arrested. But between that and being on parole from state prison where you had been released just five weeks earlier and now you're transporting drugs, those are two different things, way different." (T. 1419-20). The State relied heavily upon the dog-alert and parole-status evidence to negate the credibility of Mr. Sims' claim of self-defense.

The prosecutor, however, went far beyond fair and proper argument on those evidentiary points. He repeatedly assailed Mr. Sims as a "liar" and characterized his testimony as "lies." (T. 1416, 1419, 1424, 1425, 1430, 1433, 1438, 1439). He attempted to buttress his attacks on Mr. Sims' credibility with

expressions of his personal opinions about the case and defendant, based on non-evidence from outside the record :

> And you know what? You want to know what I get real tired of hearing, in the 12 years I have been doing this, that every officer says "I am going to kill you. I am going to kill you." Well, you know what, ladies and gentlemen, if Officer Stafford was ever going to kill that defendant, that's when he should have done it. And there is not a thing any one of us would have said about it. You're being attacked by him with a radio, that's when he should have killed him. That's when he should have pulled out the Glock 17 and this defendant should be dead.

(T. 1428). Thus, based entirely on his purported personal knowledge, the prosecutor represented to the jury that, as a matter of fact, criminal defendants make a habit of falsely accusing police officers and declared that Officer Stafford should have killed Mr. Sims when he had the chance.

While branding Mr. Sims a liar, the prosecutor also launched an attack on the personal integrity of defense counsel, suggesting that defense counsel had deliberately coached Mr. Sims' purportedly false testimony:

> I am lucky I didn't ask him his name over because what would his answer have been to me? "He was choking me and I didn't intend to kill him."
>
> But he wanted you to believe – because I asked him specifically, Did you rehearse this? Did you go over it? His testimony was, "I never went over this. I never went over it." Yet in almost every answer to me, "He was choking me; I didn't intend to kill him." (T. 1417).
>
> I don't get it. Did you not rehearse the defendant long enough to give the right answers?

(T. 1437). Further, the prosecution accused the defense counsel of "adding" things to the evidence and deliberately misleading the jury. First, with respect to Otis Robinson's identification of Mr. Sims, the prosecutor contended:

> Now, I gather [defense counsel] also, when he gets up here, *wants to add his own evidence like [Mr. Carter] did yesterday.* And we will talk about that. And I don't recall any witness during this trial that ever said this defendant's picture was in the newspaper on on T.V. prior to the photographic lineup being shown to either witness [Robinson or Castano].
>
> Well, that's what Mr. Carter did to you yesterday; no real evidence of this, but I will argue it to you anyway. *That's what misleading is.* There is no evidence of that. …
>
> Mr. Robinson and Ms. Castano picked out photographs in a photographic lineup. If these two gentleman thought they were wrong, they had an opportunity to get up and cross-examine them and show you they were wrong. did either one of these two lawyers do that? No.
>
> Yet, in closing statement – because he tells you he is not arguing with you. In closing statement, *he tells you evidence which has not even been brought out in the trial that he's going to tell you to help you out.*"

(T. 1423-24) (emphases added). Thereafter, the prosecutor again asserted:

> Otis identified [Mr. Sims] in the photographic lineup.
>
> If Otis is wrong, when he cross-examined him, why didn't they ask him, "You're not really sure about this picture." Ask him, "You had seen him in the newspaper before." Ask him, "you had seen him on TV before." Why don't you ask him that?

In fact, defense counsel did ask Mr. Robinson if he had seen Mr. Sims' photo in the newspaper and on television before identifying him in a photo lineup. Mr. Robinson conceded that he had. (T. 1407).

Second, the prosecutor accused defense counsel of misleading the jury by arguing that Mr. Sims had turned his back on Stafford to avoid being shot:

> Mr. Pitts told you that the reason defendant turns his back to Officer Stafford after he hits him in the head with the radio -- and now this is new too because [the] defendant never said this, but Mr. Pitts, *who doesn't want to mislead you*, tells you this is so Officer Stafford couldn't shoot him in the back.
>
> Remember, he told you that "I just turned around to beg for my arrest." He never said – he never said, "I turned around so I wouldn't be shot in the back." *That's Mr. Pitts not want to mislead you*. No evidence of that either.

(T. 1437 (emphases added)). In fact, Mr. Sims specifically testified that he turned around "[b]ecause I didn't want him to shoot me." (T. 1234).

Despite these mischaracterizations – of which the above are only two examples[3] – and direct attacks on their integrity, Mr. Sims' counsel sat silent. They also raised no objection when the prosecutor attempted to capitalize on the status of his office to bolster his own credibility at their expense:

> You know, in the courtrooms of this building there is usually something which sits over the Court's head in the bigger courtroom.

[3] In another example, during closing arguments the prosecutor dropped to his knees to suggest that Officer Stafford was kneeling when he was shot -- a suggestion completely unsupported by the evidence at trial. (T. 1442).

> It's in real big letters, and it says, "We who labor here seek only the truth." *We who work here* want you to decide what the truth is.
>
> *I can't make up evidence. I have not stood up here and misled you. I have not told you anything which I did not present to you. I have done my job*.

(T. 1441 (emphases added)). By invoking this motto, the prosecutor was asserting that he – in contrast to the defendant and defense counsel – "can't make up evidence" or "mislead" the jury. At no point during the closing argument did Mr. Sims' counsel raise any objection to anything the prosecutor said.

Thereafter, following more than four hours of deliberation, the jury returned verdicts of guilty on the charges of first-degree murder and armed robbery. (T. 1477-78).

II. FACTS PERTINENT TO INEFFECTIVE ASSISTANCE AT THE PENALTY PHASE OF MR. SIMS TRIAL

A. The Penalty Phase Hearing

The penalty phase of Mr. Sims' trial was held on the morning of February 4, 1994, and lasted a total of about three hours. Mr. Carter had exclusive responsibility for both the preparation, including the investigation of mitigation evidence and preparation of witnesses, and the conduct of the penalty phase proceeding on Mr. Sims' behalf. (ROA 1171). Mr. Pitts was present at the proceeding but did not participate.

At the penalty phase trial, the State presented evidence from the fingerprint examiner in the case and Mr. Sims' parole officer, Essie Lynn. (T.

1489-97). The defense again put Mr. Sims on the stand and presented perfunctory testimony from several other witnesses: Mr. Sims' three sisters, Patricia Speights, Cathy Sims, and Brenda Sims; his mother, Annie Sims; a former girlfriend, Tranae Rogers; and a friend, Mervin Simmons. The testimony elicited by Carter from all these witnesses combined – the entirety of Carter's case for Mr. Sims' life – comprises a total of barely 17 double-spaced pages in the trial transcript.

While much of the testimony consisted of background information and irrelevant questions with terse, one-word answers, substantial portions of the testimony elicited by Carter were affirmatively harmful to Mr. Sims. For example, Carter was taken by surprise when Mr. Sims' high-school friend, Mervin Simmons, announced that Mr. Sims had used drugs in high school:

> Q: Did you ever know him to use drugs?
> A: When he was in high school.
> Q: *He used drugs in high school?*
> A: *Yes.*
> Q: *He did?*
> A: Both of us.

(T. 1498) (emphasis added). Prompted by Carter's questions, Mr. Simmons also testified that Mr. Sims had been in a fight in high school. (T. 1499). Even worse, several of the witnesses testified that the only reason Mr. Sims should not receive the death penalty was "[b]ecause he is not guilty" or because he "acted in self-defense" (T. 1505; T. 1524) – even though the jury had already squarely rejected those contentions by convicting Mr. Sims.

Carter also asked several of the witnesses whether they believed in the death penalty. Each witness testified in response that they opposed the death penalty as a matter of principle. (T. 1499, 1503, 1510-11, 1522).

During the penalty phase proceeding, Carter introduced no evidence from a mental health expert. Moreover, virtually no evidence concerning Mr. Sims' work history was introduced, other than an incidental comment about Mr. Sims working at a McDonald's restaurant while in high school. (T. 1522).

After deliberating, the jury recommended a death sentence by a vote of eight (8) to four (4). (T. 1600).

B. *Spencer* Hearing

At the close of the penalty phase proceeding, the court scheduled the *Spencer* hearing for March 18, 1994 – five weeks after the penalty phase hearing. (T. 1604). In response to the prosecutor's comment that, "[o]n that day, I imagine the Court is going to entertain any further witnesses the defense may have," the court stated: "That's correct." (T. 1604).

Despite having five weeks to prepare, however, Carter presented no additional evidence or substantive argument at the *Spencer* hearing on March 18. Carter made a brief statement pointing out that Mr. Sims was 24 years old, rather than 25, at the time of the crime. (T. 1609). Rather than presenting evidence or argument to the court, Carter relied on a three-page "Sentencing Memorandum"

submitted to the court prior to the *Spencer* hearing. (ROA 1204). Carter's memorandum set forth a laundry list of numerous mitigating factors, including "The defendant is a human being." and "Aspects of the defendant's character as testified to by family members [sic]." (ROA Dir. 544). The Memorandum contains no sustained argument or marshalling of mitigating evidence in Mr. Sims' support. (ROA Dir. 543, ROA 1203).

The court recessed for barely more than an hour before announcing its decision to adopt the jury recommendation and impose the death sentence. (T. 1610). In announcing the sentence, the court stated that it found "no evidence" of any statutory mitigating factors asserted by Carter in the sentencing memorandum. (ROA Dir. 551). Moreover, the court attached "little to no weight" to the non-statutory mitigators alleged by Carter. (ROA Dir. 551). The court adopted each of the aggravating factors asserted by the State, including that he had committed the offense while "under sentence of imprisonment." (ROA Dir. 551). At no point during any proceeding did Carter object to or challenge any of the aggravating factors urged by the State and later adopted by the court.

III. POST-CONVICTION PROCEEDINGS UNDER FLORIDA RULE OF CRIMINAL PROCEDURE 3.850

Following the exhaustion of his direct appeal, *see supra* at 2, Mr. Sims filed in the trial court a Motion to Vacate, or to Set Aside, Judgment and Sentence Pursuant to Florida Rule of Criminal Procedure 3.850. (ROA 32). An

Amended Motion was filed on June 28, 1999, setting forth numerous grounds for vacating Mr. Sims' conviction and sentence. (ROA 257-308). The Amended Motion raised and requested a hearing with respect to, *inter alia*, all of the points which form the basis of the present appeal to this Court.

A. Mr. Sims' Rule 3.850 Motion and the Facts Pertinent to Defense Counsel's Alleged Conflict of Interest With Defendant

Specifically, with respect to the conviction, the Amended Motion alleged ineffective assistance of counsel at the guilt/innocence phase of Mr. Sims' trial on numerous grounds, including, *inter alia*, (1) counsel's failure to object to or oppose the admission of evidence concerning the "dog alert" to Mustipher's car, and (2) the failure to object to the prosecutor's numerous improper remarks during closing argument. (ROA 271-93). Further, the Amended Motion contended that Mr. Sims' penalty-phase representation also was constitutionally deficient as a result of, *inter alia*, (1) Carter's undisclosed conflict of interest stemming from the fact that he was under investigation by the Florida State Bar during his representation of Mr. Sims; (2) counsel's failure to obtain or even consult with a mental health expert; (3) failure to investigate and present mitigation evidence; (4) failure to adequately prepare or examine mitigation witnesses; (4) failure to present any argument or testimony at the *Spencer* hearing; (5) failure to prepare or submit an adequate sentencing memorandum; and (6) failure to ensure that the jury was

properly informed that Mr. Sims would never be eligible for parole if sentenced to a life sentence. (ROA 287-305).[4]

With respect to Carter's alleged undisclosed conflict of interest, Mr. Sims alleged that at the time of his trial Carter was under investigation by the state attorney's office, the police department, and the Florida Bar for alleged billing abuses in court-appointed cases. The investigations were triggered by a series of stories that ran in the Miami *Herald* in April 1992 detailing abuses in Dade County's court-appointment system. The *Herald* specifically identified Carter, reporting that he had consistently over-billed the county for representing indigent criminal defendants. According to the stories, Carter was among the county's five top-earning attorneys in court-appointed cases and on eleven occasions had billed the county for more than 24 hours' services in a single day. Jeff Leen & Don Van Natta, Jr., "Friends of the Court," Miami *Herald*, April 12, 1992, at 1A. State Attorney Janet Reno reacted to the *Herald* articles by announcing that prosecutors

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[4] In addition to his Rule 3.850 motion, Mr. Sims filed a contemporaneous motion to disqualify Judge Carney from presiding over the Rule 3.850 motion. (ROA 83). In his motion to disqualify, Mr. Sims stated that Judge Carney would be a material witness in the proceedings because, in his 3.850 motion, Mr. Sims asserted that Arthur Carter had an actual conflict of interest that adversely affected his representation of Mr. Sims. Mr. Sims contended that Judge Carney either knew or should have known of Carter's conflict of interest, and thus had a duty to inquire at the time as to whether there was a conflict and whether Mr. Sims had consented to continued representation. (ROA 84-85).

in her office's organized crime division would investigate the billing abuses. Jeff Leen & Don Van Natta, Jr., "Attorneys For Poor Probed," Miami *Herald*, April 15, 1992, at 1A.[5]

Carter's billing practices remained under investigation throughout his representation of Mr. Sims. A June 8, 1994, *Herald* article quoted an assistant state attorney as saying that the investigation into Carter and others was "'still alive. . . . All those matters are still under investigation.'" Joan Fleischman, "Club Honors Rebozo By Naming New Center For Mom," Miami *Herald*, June 8, 1994, at 2B. On December 20, 1994, the Herald reported that "[a]fter an exhaustive investigation by prosecutors and the Bar," Carter had admitted violating a Florida Bar rule, received a public reprimand from the Bar, and agreed to pay restitution to Dade County. Don Van Natta, Jr., "Over-Billing Gets Lawyer a Reprimand," Miami *Herald*, December 20, 1994, at 1B. Shortly thereafter, Carter failed to pay restitution and was suspended by the Bar.[6] In his Rule 3.850 motion, Mr. Sims

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[5] The *Herald* articles also attracted the attention of Chief Judge Leonard Rivkind of the Eleventh Judicial Circuit of Florida, who appointed a Bench/Bar Committee to study the county's judicial appointment system. (ROA 211). Judge Carney was asked to co-chair that Committee, which rendered its report on July 17, 1992. (ROA 210). The report included a memorandum from Committee-appointed auditors indicating that details of billing abuses had been provided to the police department and the state attorney. (ROA 221).

[6] Because judges have an independent duty to inquire about conflicts of interest that are known to them, Judge Carney's involvement in the billing investigation and his knowledge of Carter's investigations were material issues of (continued…)

contended that these investigations constituted an actual conflict of interest that compromised Carter's representation. (ROA 287-91).

A *Huff* hearing was held on July 14, 1999. On January 4, 2000, the trial court granted an evidentiary hearing on three issues raised in the Amended Motion: "(1) Failure to investigate and present mitigation evidence; (2) Failure to retain a mental health expert and timely obtain other witnesses; (3) Failure to allege to the jury that if defendant were sentenced to life, he would allegedly never be eligible for parole." (ROA 388). The Order stated that "[a]ll other issues raised by Defendant's counsel will not be considered at this time." (ROA 388).

B. Evidence Presented at the Rule 3.850 Evidentiary Hearing

The Rule 3.850 evidentiary hearing into the issues specified by the trial court's January 2000 order was conducted on February 18-19, 2003. (ROA 943 *et seq.*). During the hearing, Mr. Sims presented extensive evidence relating to Carter's deficient preparation and performance during the penalty phase.

1. Carter's Cursory Investigation of Mitigation Evidence

The evidence presented at the evidentiary hearing established that Carter failed to reasonably develop or present mitigation evidence during the

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fact in the post-conviction proceedings. At the *Huff* hearing, Judge Carney made unsworn assertions from the bench that he had no personal knowledge of Carter's alleged improper practices at the time of Mr. Sims' trial. (ROA 376-78). Thereafter, he rejected the disqualification motion, as well as a later renewed motion, without written explanation. (ROA 242, 386).

penalty phase of the trial. Carter testified that Mr. Sims was cooperative and never instructed Carter to curtail or forgo the development of mitigation evidence. (ROA 1179). In fact, Mr. Sims fully supported a rigorous investigation into possible mitigation evidence. Nevertheless, even though the court initially offered $3,000 for mitigation investigation, Carter requested only $1,000. (ROA Dir. 203-04, ROA 1178-79). At no point did Carter ever request additional funds to further investigate mitigation evidence, even though he believed that the court would have granted additional funds if requested to do so. (ROA 1178-79).

The $1,000 went to a private investigator, Jeffrey Geller, who conducted an initial investigation. (ROA 1178). Geller's investigation consisted of 34.5 hours of investigation, primarily devoted to research concerning Officer Stafford, rather than Mr. Sims. (DX C § 25). Geller ended his investigation when the $1,000 from Carter ran out. Geller's report summarized interviews conducted with Sims' family, although most of the summaries consisted of only a few sentences. (DX C). Geller noted repeatedly in the report that "additional attempts [to locate mitigation evidence] can be made should you request."[7] (DX C §§ 6, 15,

[7] A note in the materials compiled by Geller suggested that Mr. Sims was reluctant to cooperate in the mitigation investigation. Mr. Sims testified that he did not make this statement. (ROA 1275). Moreover, Carter testified that Sims fully supported the development of mitigation evidence and the note in the Geller (continued…)

16, 19, 22, 23). Carter never asked Geller to conduct additional investigation; in fact, Carter never met or even spoke with Geller about his investigation:

> Q: Before Mr. Geller did that investigation, did you have any discussion with him about what you wanted him to do?
> A: No, I did not.
> Q: Did you give him any instructions about what to do or where to look?
> A: No.
> ….
> Q: After you reviewed the material [prepared by Geller], did you have any conversations with Mr. Geller about what they contained?
> A: No, I don't think so.

(ROA 1172-74). The record developed at the Rule 3.850 evidentiary hearing established that Carter conducted no independent investigation into possible mitigation evidence. Instead, he relied entirely on Geller's investigation, but conducted no substantive follow-up from that report and did nothing to develop additional mitigation evidence. (ROA 1174).

a) Carter's Failure to Investigate Mental Health Evidence

Carter testified that, throughout his representation of Mr. Sims, he never retained or even consulted with a mental health professional in order to develop mitigation evidence. (ROA 1182). Carter's only explanation for this failure was that he personally did not "s[ee] the need," based on his own judgment

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materials had no impact on his decisions concerning the development of mitigation evidence. (ROA 1180-81).

of Mr. Sims. (ROA 1181-83). Carter admitted, however, that one of his primary objectives at the sentencing phase of the trial was to mitigate the offense through mental health factors.

At the evidentiary hearing, Carter acknowledged that the materials he received from Geller contain multiple references regarding mental health issues. The materials noted, for example, that Mr. Sims had a history of head injuries, including "being struck by a car" at the age of 1 or 2. (DX C § 5). Moreover, the records contained numerous references to psychological and emotional factors that suggested the utility of a mental health examination. (DX C §§ 7, 8, 10). For example, more than one member of Mr. Sims' family told Geller that Mr. Sims' problems could be traced to the impact of the death of his father. (DX C §§ 7, 8, 10). Mr. Sims' mother told Geller that after the death of his father "Merrit seemed to lose control, and one thing after another began to happen." (DX C § 10).

Carter was aware of these indications suggesting the possibility that Mr. Sims had an emotional or personality disorder. In fact, he regarded these factors as significant enough to include in his Memorandum in Support of a Life Sentence. (ROA 543). In his memorandum to the court following the jury recommendation of death, Carter listed as nonstatutory mitigating factors: "The death of defendant's father devastated the defendant" and "there is no evidence showing that the homocide [sic] was anything but the results [sic] of a fear in the

mind of the defendant." (ROA Dir. 544-45). At the evidentiary hearing, however, Carter acknowledged he presented no evidence to the jury to support these nonstatutory mitigating factors. Carter testified that he had no strategic reason whatsoever for failing to present such evidence. (ROA 1209).

With respect to statutory mitigating factors, Carter testified that one of his strategies at the penalty phase was to show that at the time of the shooting, Mr. Sims was "under a great deal of stress and in great fear" and that "his emotions were out of control or at a high level of agitation." (ROA 1204). Carter testified that he knew it was important to present this point to the jury, but admitted that - without any strategic justification - he had failed to develop any psychological evidence to support this statutory mitigating factor.

> Q: Did you have any psychological evidence to support your contention that Mr. Sims was in a state of great stress and fear at the time he killed Officer Stafford?
> A: No, I did not.

(ROA 1209-10). Moreover, Carter acknowledged that he never even advised the jury about the statutory mitigating factor of "extreme mental or emotion disturbance." (ROA 1212-13). Instead, the only statutory mitigating factor referred to by Carter was that "the defendant acted under extreme duress and

substantial domination of another person."[8] Carter could give no strategic reason for relying solely on this inapposite mitigating factor. (ROA 1211-13).

b) Testimony of Dr. Charles Golden

At the Rule 3.850 evidentiary hearing, Mr. Sims presented the testimony of Dr. Charles Golden, a board-certified clinical psychologist and neuropsychologist and professor at Nova Southeastern University. (ROA 984). Dr. Golden testified that in his nearly three decades of expert witness work, he has evaluated approximately 85 capital and non-capital murder defendants. (ROA 993). Dr. Golden testified that after conducting clinical examinations, he frequently concludes that he can not testify regarding mental health mitigating factors. (ROA 993-95). Although he has declined to testify on behalf of approximately half of the defendants he has evaluated, (ROA 995), Dr. Golden testified on Mr. Sims' behalf.

First, Dr. Golden testified that the Geller materials contain information clearly suggesting that a full mental health evaluation was necessary for Mr. Sims. (ROA 1073). In particular, Mr. Sims' history of head injuries plainly signaled some kind of brain injury "was certainly a possibility." (ROA

[8] Given that Mr. Sims acted entirely alone, it is not clear how the "substantial domination" mitigating factor could apply to Mr. Sims' case. At the hearing, Carter could only offer the nonsensical explanation that his theory was that Mr. Sims acted under his own domination/duress. (ROA 1213).

1076). These head traumas began at a very young age and suggested the possibility of organic bran injury. (ROA 1074).

Dr. Golden conducted a thorough battery of tests on Mr. Sims and interviewed several members of Mr. Sims' family. (ROA 1004-09). Based on these tests and interviews, Dr. Golden testified that Mr. Sims suffered from a personality disorder clinically categorized as Personality Disorder N.O.S. (Not Otherwise Specified). (ROA 1032). Dr. Golden testified that while the N.O.S. designation reflects the fact that Mr. Sims' personality disorder occurs less frequently than other disorders, it has no less scientific validity and is no less severe than other disorders with more familiar and specific names. (ROA 1032-33). Dr. Golden testified that, as a result of his disorder, Mr. Sims suffers emotional problems that interfere with his ability to process information properly and to develop complex interpersonal evaluations," resulting in pronounced "problems in dealing with emotion[al] stimuli." (ROA 1018-20). Moreover, people suffering from Mr. Sims' disorder frequently misperceive other peoples' intentions and misconstrue "what is happening in reality." (ROA 1021).

Dr. Golden further testified that the roots of Mr. Sims' personality disorder can be traced to the circumstances of his upbringing, and, in particular, the influence of Mr. Sims' severely alcoholic, "very violent and unpredictable" father. (ROA 1036). Mr. Sims' father was an alcoholic subject to violent outbursts – he

frequently would beat Mr. Sims and his siblings with "leather straps" that left the children with bruises and cuts. (ROA 1043). "Merrit [w]as afraid of his father" and would hide "when his father was drinking." (ROA 1037). Mr. Sims' father, who was once arrested for attempting "to kill one of Merrit's sisters," had a collection of firearms "which he would shoot off sometimes in the house." (ROA 1037). As a result, "Mr. Sims grew up in an uncertain, unpredictable environment in which his father, without advance warning, could turn into an incredibly violent dangerous individual." (ROA 1038). This domestic violence was exacerbated by the rampant shootings and other street violence that was endemic in the inner-city neighborhoods where Mr. Sims grew up. (ROA 1044-45).

Mr. Sims' personality disorder manifested itself in the form of depression, substance abuse, feelings of failure, and problems in dealing with emotional stimuli. (ROA 1053-54). These symptoms caused Mr. Sims to suffer from a heightened susceptibility to stressful events. Furthermore, in the period leading up to June 11, 1991, the symptoms of Mr. Sims' psychological disorder were magnified by a series of events, including the deaths of Mr. Sims' father in 1989 and two other significant persons in Mr. Sims' life.[9] (ROA 1050). The

[9] Dr. Golden explained that Mr. Sims' personality disorder resulted in a "love-hate" relationship with his father. Although Mr. Sims feared his father, he also (continued…)

combination of these events caused Mr. Sims to spiral deeper into depression and alcohol abuse. They also coincided with Mr. Sims' first difficulties with the law. Dr. Golden testified that in the days immediately preceding June 11, 1991, Mr. Sims was unquestionably "wallowing in depression." (ROA 1056).

Dr. Golden further testified that the combination of Mr. Sims' depression, substance abuse, and personality disorder played a decisive role in the confrontation between Officer Stafford and Mr. Sims. When confronted by the physically larger and threatening Officer Stafford, Mr. Sims' abnormal neuropsychological tendency to exaggerate threats caused him to "become increasingly terrified." (ROA 1059). As the situation escalated, Mr. Sims' disorder caused him to perceive that he was "back in the same situation he was [in] when he was a child," making it "difficult for [Mr. Sims] to overcome those fears and terrors that were rising up inside him." (ROA 1059-61). Ultimately, Dr. Golden concluded that the combination of Mr. Sims' disorder and the confrontation with Stafford impaired Mr. Sims' judgment and caused him to "react instinctively at best rather than thinking through what he was doing and how he was doing it." (ROA 1061).

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adored him, and, therefore, the death of Mr. Sims' father had a devastating psychological effect. (ROA 1050).

Based on these factors, Dr. Golden testified that in his expert opinion, Mr. Sims was in a state of "extreme mental or emotional disturbance" at the time the offense occurred. (ROA 1062). Mr. Sims' capacity to appreciate the criminality of his conduct and to conform his conduct to the law were substantially impaired "because of the state of terror that he was under:"

> [Mr. Sims] believed himself to be threatened for serious bodily harm by the officer and he believed that what he was doing was, although he quite clearly knows and knew that murder is a crime, that what he was doing was defending himself. (ROA 1063).

c) Failure to Investigate or Present Fact Witnesses

In addition to not investigating possible psychological mitigation evidence, the record at the Rule 3.850 evidentiary hearing demonstrates that Carter made no effort to investigate fact witnesses identified in the Geller report. For example, even though the Geller report identified coworkers with whom Mr. Sims had worked, no coworkers were asked to testify at the trial:

> Q: Do you understand those [names in the Geller report] to be the names of various people that Mr. Sims worked for during his employment with those firms?
> A: That's correct.
> Q: Did you call any of those people to testify about Mr. Sims' work history at this penalty phase trial?
> A: No, I did not.
> …
> Q: You did not have any strategic reason for not putting on that evidence, did you?
> A: No.

(ROA 1177). The testimony presented at the evidentiary hearing demonstrated that Mr. Sims had an accomplished employment history. Mr. Sims worked at McDonald's full-time while completing high school. (ROA 1267-68). Thereafter, he worked for at least two construction companies, Tier Construction and Buntain Construction, eventually earning a promotion to foreman at Tier. (ROA 1268, 1273). Even while incarcerated prior to trial in 1994, Mr. Sims continued to participate in voluntary work programs while in prison. (ROA 1273).

Stanley Thomas, who was Mr. Sims' work supervisor at various high-rise construction sites for Tier Construction, testified at the Rule 3.850 hearing that Mr. Sims was "willing to learn, willing to go forward, a step higher and, as a matter of fact, he end[ed] up step[ping] higher because he was being my labor foreman." (ROA 968). Mr. Sims earned the trust and respect of all of his work supervisors and was promoted through the ranks from his initial job as an entry-level laborer up to a position as on-site work supervisor. (ROA 968-70). Thomas, whose name appeared in the materials that Carter received from Geller (DX C § 5), was willing to testify on Mr. Sims' behalf at the initial penalty trial, but he never heard anything from Mr. Sims' lawyers. (ROA 975). Numerous other work supervisors, including Jack Powell, Bobby Powell, and Randy Mischoux, also would have testified for Mr. Sims. (ROA 975). None of those work supervisors

was ever contacted by Mr. Sims' lawyers, though their names were in the materials prepared by Geller. (DX C § 5).

Carter never requested that Geller make contact with any of the numerous other witnesses identified as potential witnesses in the materials. (ROA 1177; DX C § 5, 8). Several of these same witnesses did testify at the Rule 3.850 evidentiary hearing. For example, Timmie Terry, a school teacher of Mr. Sims, testified that as a child, Mr. Sims was "not aggressive…. he was just a sweet little fellow. Just kind, soft spoken, respected adults." (ROA 1158). He also testified that Mr. Sims was "never, never, never," involved in violence. (ROA 1153-54). Rosalyn Cox, another teacher of Mr. Sims, testified that Mr. Sims was a "quiet, honorable, well-dressed young man" who was not involved in fights, bullying or "things of that nature." (ROA 1137). Both Mr. Terry and Ms. Cox testified that they were living in the Miami area at the time of Mr. Sims' trial and would have testified had they been contacted. (ROA 1142, 1159).

2. Failure to Adequately Prepare Hearing Witnesses

Testimony at the evidentiary hearing also confirmed that Carter failed to prepare the witnesses whom he did call or to develop their mitigating testimony. As an initial matter, Carter failed to appear at the depositions of two of his key mitigation witnesses and, as a result, the witnesses were deposed by the State without the presence of counsel for Mr. Sims. Thereafter, Carter's witness

"preparation" consisted entirely of a few minutes with the witnesses in the hallway of the courthouse immediately prior to their testimony.

> Q: [P]rior to the day of the penalty phase proceding, did you have any substantive discussion at all with [Mr. Sims' mother] concerning what she would testify to?
> A: No, I did not. No, I did not.
> Q: Did you meet with Mr. Sim's sisters prior to the day of the penalty phase proceeding?
> A: No, I did not.
> ….
> Q: Did you talk to any of these people at all before you put them on the stand to testify that day?
> A: Yes.
> Q: Where did you talk to them?
> A: In the hallway.
> Q: With each of those witnesses, about how long did you spend with them?
> A: Maybe five minutes.

(ROA 1199-1200). Nor did Carter ever meet with Mr. Sims to discuss his penalty phase testimony. (ROA 1279).

3. Failure to Ensure Clear Instructions to Jury Regarding Parole Eligibility

Throughout the trial and penalty phase proceedings, there was substantial confusion about whether Mr. Sims would be eligible for parole if sentenced to life imprisonment. On two occasions during the guilt phase of the trial, the jury was informed that if sentenced for a term of imprisonment, Mr. Sims would be imprisoned for "life with a minimum of 25 years." (T. 1444). The court itself instructed the jury at the close of the guilt/innocence phase that the "penalty

for first degree murder of a law enforcement officer is death by electrocution *or life imprisonment*," without specifying whether Mr. Sims would be eligible for parole. (T. 1471 (emphasis added)). Then, during the penalty phase, the court again instructed the jury that "the punishment for this crime is either death or life imprisonment," without specifying whether the term "life imprisonment" included the possibility of parole. (T. 1570).

Carter attempted to address the improper instructions during his closing argument, and the Court told the jury at the end of the penalty phase that if it chose a life recommendation, its advisory sentence would include the words "without the possibility of parole." (T. 1584-85, 1598-99). However, the actual verdict form given to the jury during their deliberations stated that the jury's options included death or life imprisonment "without the possibility of parole for 25 years." (ROA Dir. 539). Although the court stated outside the presence of the jury that it had taken some "white-out" fluid and "changed the verdict to erase the 25-year portion," no such "altered" verdict form exists in the official record of this case. (T. 1567-69). Rather, the ROA of Mr. Sims' direct appeal and the official files of the court contain only an unredacted verdict form showing that Mr. Sims would have the possibility of parole after 25 years imprisonment.

Throughout this sequence of events, Carter did not request a conclusive curative instruction from the court. Nor did he inspect the jury verdict

form or request that the court draft an entirely new form to ensure that it contained accurate information about the sentences available to the jury. Instead, he allowed the confusion to linger.

4. Testimony of Steven Potolsky, Esq.

In addition to the above evidence, Steven Potolsky, Esq., a former Senior Trial Attorney at the Miami-Dade County Public Defender's Office and former President of the Miami Chapter of the Florida Association of Criminal Defense Attorneys, offered expert testimony on the prevailing standards and norms of attorney conduct with respect to the issues identified in the court's January 2000 Order. Potolsky has defended or supervised over 50 capital cases, and his opinions on ineffective assistance of capital counsel have previously been relied upon by this Court. *See State v. Riechmann*, 777 So.2d 342, 349 (Fla. 2001).[10]

Based on his extensive review of the record, Potolsky opined that, in light of prevailing professional norms, Carter's performance at the penalty phase "fell below an objective standard of reasonableness for counsel in a death penalty case" in multiple respects:

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[10] Prior to the evidentiary hearing, the State moved to exclude the testimony of Mr. Potolsky. (ROA 840). Judge Carney denied the motion. (ROA 957). In its Memorandum of Law submitted following the evidentiary hearing, the State renewed its motion. (ROA 917).

- Carter failed to follow up on any of the leads and other issues raised by the Geller investigation and failed to conduct any independent investigation to develop sources of mitigation evidence. (ROA 1308-30).

- In particular, Carter failed to consult with or have Mr. Sims examined by a mental health expert, despite clear indications in Geller's materials that would have alerted competent capital defense counsel to the necessity of pursuing this avenue of investigation. In light of Mr. Sims' history of head trauma and emotional difficulties, there was "no conceivable strategic justification" for failing to obtain a mental health examination that – as Dr. Golden's testimony demonstrated – would have led to a "far more mitigated version of the events" surrounding Mr. Sims' shooting of Officer Stafford. (ROA 1321).

- Carter's "ill prepared, ill rehearsed" and perfunctory presentation at the penalty-phase hearing did "not even come close" to meeting the minimal standards of effectiveness capital defense counsel are expected to meet. (ROA 1330-34).

- Carter failed to take adequate steps to eliminate confusion in the sentencing choices presented to the jury, even though "any experienced capital defense lawyer knows … that as jurors' perception of the likely amount of time to be served increases[,] the willingness to impose the death penalty decreases." (ROA 1339).

- Following the jury's 8-to-4 death recommendation, Carter failed to make any further substantive presentation on Mr. Sims' behalf, even though all competent capital defense counsel know that, "[i]n the wake of an eight to four jury recommendation for death, unless something is done at the *Spencer* hearing, your client is going to die." (ROA 1344). Potolsky further stated that the sentencing memorandum submitted by Carter was "about the most poorly drafted and unconvincing pleading that I have ever seen in a capital case" and, "especially considering the circumstances of this [case]," was "inexcusable." (ROA 1344).

In light of all these shortfalls, and the jury's narrow 8-to-4 vote, Potolsky concluded that "it is inconceivable … that there wouldn't be a reasonable

probability that two additional jurors would have been swayed towards life by an effective presentation of a penalty phase" in this case. (ROA 1337). Accordingly, there is a strong probability that the outcome of Mr. Sims' penalty phase would have been different had he received effective assistance of counsel. (ROA 1346).

C. The Lower Court's Denial of Post-Conviction Relief

On July 31, 2004, the court issued a four-page "Order Denying Post-Convection [sic] Relief," denying Mr. Sims' Amended Motion under Rule 3.850 in its entirety.[11] (ROA 926-29). The Order first refused to consider certain issues on the grounds that they were beyond the scope of the three hearing issues identified in the court's January 4, 2000 order granting the evidentiary hearing, and "defendant presented nothing in two days of hearing as to why the new grounds could not have been previously raised." (ROA 926). Unfortunately, the court seems to have overlooked the fact that *all* of the issues referred to in the Order were raised in Mr. Sims' Amended Motion to Vacate (*see* ROA at 302 (challenge based on court's rubber-stamping of prosecution's "Sentencing Memorandum"); 303 (deficiency in counsel's performance at *Spencer* hearing)) and therefore plainly could not be procedurally barred. Nor did the court provide any factual

[11] Mr. Sims filed an extensive Post-Hearing Memorandum in Support of Rule 3.850 Motion in the Circuit Court on April 15, 2003. (ROA 844).

justification for regarding the foregoing issues as outside the scope of its first granted issue, namely, "[f]ailure to investigate *and present* mitigation evidence."

Second, the court granted the State's renewed motion to exclude the testimony of Steven Potolsky, on the grounds that "the question of effective assistance is a question of law to be applied to the facts of this case and not subject of testimony pro or con." (ROA 927).[12]

Third, the Order denied the ineffective-assistance claims presented by Mr. Sims at the February 2003 evidentiary hearing. The court declared that Carter's performance in investigating mitigation evidence was sufficient:

> The allegation is made that counsel's failure to investigate and present mitigating evidence was lacking. Clearly a trip to California was made and an investigator named Geller went there. This apparently covers whether the defendant lived his life time [sic] at the foot of the cross. The truth is that defendant escaped to California. He was a fugitive there. That's not mitigating evidence.

(ROA 927).[13] Citing only the fact that Carter had called several witnesses at the penalty phase, the court asserted that the evidence at the Rule 3.850 hearing

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[12] The sole authority cited for this conclusion, for which the Order provides no further reasoning, was *Freund v. Butterworth*, 165 F.3d 839 (11th Cir. 1999). As explained further below, *see* part IV *infra*, *Freund* is not apposite here.

[13] In fact, Mr. Geller did not go to California, nor was there any evidence in the record that he did. It appears that the court was alluding either to Carter's trip to California prior to the guilt/innocence phase of Mr. Sims's trial or Mr. Sims' trip to California following the shooting. But the court did not attempt to explain what relevance Mr. Sims' escape had to the sufficiency of Carter's mitigation search.

showed only "differences with choices made by counsel," and that "trial counsel did what he could with a barren, empty source of mitigation." (ROA 927).

Fourth, the court rejected Mr. Sims' argument regarding Carter's failure to investigate and present mental-health evidence. The court concluded: "What evidence of mental impairment was there? There is nothing in this record to show the need for such an inquiry." (ROA 927). The court declared that the evidence "simply shows the issue to be not fertile ground," without providing any factual findings to support that conclusion. (ROA 927-28).

Fifth, the court discounted the testimony of Mr. Sims' former co-worker on the ground that they "could not shed any insight in the 6 to 12 years presiding [sic] this shooting." This assertion was incorrect as a matter of fact, since the testimony of Mr. Thomas concerned the time period up to and including 1998 – three years before the shooting. (*See* ROA 1267-74).

Finally, the Order held that Carter was not ineffective for failing to ensure that the jury was accurately instructed regarding the possibility of parole for Mr. Sims, based upon (1) Carter's own factual correction in his closing statement, and (2) the court's reference in the trial transcript to a whited-out verdict sheet "to erase the 25-year portion." (ROA 928-29). The Order did not address any of Mr. Sims arguments at the hearing as to why both of the foregoing points were insufficient to cure the error or erase the prejudice resulting from it.

Without acknowledging or addressing any of the other contentions raised in Mr. Sims Amended 3.850 Motion, for which no evidentiary hearing was ever granted, the Court summarily denied the amended motion in its entirety.

SUMMARY OF ARGUMENT

Mr. Sims was convicted and sentenced to death in violation of the Constitution of the United States and the laws and Constitution of the State of Florida. The representation provided to Mr. Sims by his two appointed attorneys during both the guilt/innocence and penalty phase was replete with errors and outright failures that fell far below the standard of reasonable professional performance. In denying Mr. Sims' Rule 3.850 motion, the lower court failed to address key issues raised by Mr. Sims and ignored the law and the facts pertinent to those issues it did address.

I.A. At the guilt/innocence phase of his trial, Mr. Sims' counsel failed to make even minimally competent efforts to prevent the admission of highly prejudicial evidence concerning a dog alert that allegedly indicated the presence of drugs in the car driven by Mr. Sims. This evidence was essential to the prosecution's only theory of motive, allowing the prosecution to paint Mr. Sims as a drug dealer determined to avoid arrest at all costs. Yet Sims' counsel failed to object to the admission of this highly prejudicial evidence – much less request a hearing outside the presence of the jury to challenge its admissibility.

I.B. Even though Mr. Sims' counsel knew well in advance that the State would rely on expert crime-scene testimony to attack Mr. Sims' account of the shooting, Mr. Sims' attorneys failed to prepare any competent defense to this aspect of the State's case, including failing to retain a crime-scene reconstruction expert to rebut clear factual errors in the State's presentation.

I.C. Mr. Sims' trial counsel further compounded these errors by failing to object to a string of patently improper remarks by the prosecutor during closing argument. The prosecutor violated basic canons of prosecutorial conduct by expressing his personal views and purported knowledge of extra-record matters; improperly capitalizing on the status of his office to bolster his own credibility; and attacking the integrity of defense counsel. These improper remarks, any of which could have been grounds for an objection, undermined the credibility of Mr. Sims in the eyes of the jurors.

II. The failure of Mr. Sims' counsel, Arthur Carter, to disclose that he was laboring under a material conflict of interest also fundamentally compromised his representation of Mr. Sims and demands that Mr. Sims' conviction and sentence be overturned. At the time of Mr. Sims' trial, Carter was under investigation for billing irregularities in connection with his court-appointed representations. This investigation, which ultimately resulted in Carter being disbarred, provided a strong incentive for Carter to minimize the time and expenses

he incurred in order to avoid further scrutiny of his billing practices. Carter's conflict of interest became particularly prejudicial at the penalty phase of Mr. Sims' trial, which Carter handled alone without the participation of co-counsel. Carter's failure to disclose his conflict at any time deprived Mr. Sims of his constitutional right to effective, conflict-free representation by a zealous attorney.

III.A. Following his conviction, Mr. Sims also received grossly ineffective assistance of counsel at the penalty phase of his trial. Mr. Sims' counsel failed to retain the assistance of a mental health expert or otherwise investigate or develop mental health-related sources of mitigation evidence – despite numerous signals that a full mental-health examination was necessary and potentially helpful. The testimony of Dr. Golden, an expert neuropsychologist, at the Rule 3.850 evidentiary hearing demonstrated that Mr. Sims suffered from a clinically recognized personality disorder that launched him into a state of extreme emotional disturbance during the confrontation with Officer Stafford. This testimony directly supported at least two statutory mitigating factors and easily could have altered the balance of the jury narrow 8-to-4 death recommendation. The lower court irrationally dismissed out of hand the wealth of mental-health mitigation evidence presented by Mr. Sims at the Rule 3.850 hearing – ignoring both the evidentiary record and the governing law which required Mr. Sims' counsel to pursue this source of potential mitigation evidence.

III.B. Carter abdicated his fundamental obligations as Mr. Sims' counsel at the penalty phase, conducting essentially no investigation and failing to make any but the most cursory preparations for the penalty phase hearing. The entire mitigation investigation conducted by Carter consisted of reviewing an obviously preliminary and incomplete set of materials prepared by an outside investigator. Carter conducted no follow-up from the investigator's report and failed to conduct any independent investigation of Mr. Sims' highly creditable work history and other elements of his background. Carter's witness preparation consisted entirely of conversations in the hallway immediately before the witnesses took the stand. As a result, the testimony elicited by Carter was superficial, unfocused, and often affirmatively harmful to Mr. Sims.

III.C. Even after the jury recommendation of death, Carter continued to fall down on the job, submitting a facially deficient sentencing memorandum and failing to present any witnesses or make any presentation at the *Spencer* hearing. In his last opportunity to fight for Mr. Sims' life, Carter did next to nothing at all.

III.D. While each of Carter's multiple deficiencies alone rose to the level of ineffective assistance of counsel, the cumulative impact of these numerous shortfalls was nothing short of devastating. Under these circumstances, Mr. Sims' death sentence cannot be allowed to stand.

IV. The lower court erred as a matter of law in refusing to consider the testimony of Steven Potolsky, Esq., an expert on the defense of capital cases whose opinions on ineffective assistance have previously been cited by this Court.

V. Mr. Sims' sentence is unconstitutional under the United State Supreme Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002), because the judge made the findings of fact necessary to impose the sentence of death.

ARGUMENT

I. MR. SIMS WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE COUNSEL DURING THE GUILT/INNOCENCE PHASE OF HIS TRIAL.

The legal standard applicable to claims of ineffective assistance of counsel is well-established. The Sixth Amendment to the United States Constitution, and Article I, Section 16, of the Florida Constitution, guarantee all criminal defendants "the right to effective assistance of competent counsel." *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970). This fundamental principle recognizes that defense counsel "play[] a role that is critical to the ability of the adversarial system to produce just results." *Strickland v. Washington*, 466 U.S. 668, 685 (1984). When assessing a claim of ineffective assistance of counsel, this Court applies the two-prong test of *Strickland*, evaluating (1) whether "'counsel's performance was deficient,'" and (2) if so, whether "'the deficient

performance prejudiced the defense.'" *Asay v. State*, 769 So.2d 974, 984 (Fla. 2000) (quoting *Strickland,* 466 U.S. at 687).

As to the first prong of the *Strickland* test, a defendant may establish deficient performance by showing that counsel's representation "'fell below an objective standard of reasonableness' based on 'prevailing professional norms.'" *Ragsdale v. State*, 798 So.2d 713, 715 (Fla. 2001) (quoting *Strickland*, 466 U.S. at 688). Although counsel may not be deemed ineffective for decisions made pursuant to a "sound trial strategy," *Asay*, 769 So.2d at 984, a purportedly 'strategic' decision cannot be held reasonable unless the attorney adequately investigated his options and "'ma[d]e a reasonable choice between them.'" *Rose v. State*, 675 So. 2d 567, 573 (Fla. 1996) (quoting *Horton v. Zant*, 941 F.2d 1449, 1462 (11th Cir. 1991)); *see also Wiggins v. Smith*, 539 U.S. 510, 526 (2003) (ordering new trial because counsel's "failure to investigate thoroughly resulted from inattention, not reasoned strategic judgment"); *Stevens v. State*, 552 So.2d 1082, 1086 (Fla. 1989) ("A strategic decision … implies a knowledgeable choice.") (internal quotation marks omitted)).

To establish prejudice under the second prong of the *Strickland* test, the defendant must show, by a preponderance of the evidence, that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Ragsdale*, 798 So.2d at 715 (quoting

Strickland, 466 U.S. at 694). To meet this standard, however, the defendant is *not* required to prove that the errors of counsel "'determined the outcome.'" *Rose*, 675 So.2d at 570 n.4 (quoting *Strickland*). Rather, a "reasonable probability" entails a less exacting standard, requiring only "'a probability sufficient to *undermine confidence* in the outcome.'" *Id.* (quoting *Strickland*) (emphasis added). Moreover, whether a defendant was prejudiced must be determined in light of the *cumulative* impact of all of counsel's errors and omissions upon the proceeding at issue. *See, e.g., Hildwin v. Dugger*, 654 So.2d 107, 110 (Fla. 1995) (defendant prejudiced by cumulative effect of counsel's failure to present various types of mitigation evidence at penalty phase hearing).

This Court reviews a post-conviction court's analysis of a claim of ineffective assistance of counsel under a *de novo* review standard. *Porter v. State*, 788 So.2d 917, 923 (Fla. 2001); *Windom v. State*, 886 So.2d 915, 921 (Fla. 2004). Although the Court will defer to the trial court's findings on factual issues, it "must review the court's ultimate conclusions on the performance and prejudice prongs *de novo*." *State v. Coney*, 845 So.2d 120, 128-29 (Fla. 2003) (citing *Bruno v. State*, 807 So.2d 55, 61-62 (Fla. 2001)).

A. Counsel's Abject Failure to Challenge the Admission of Evidence Concerning a Canine Alert Constituted Ineffective Assistance of Counsel.

Lacking any persuasive evidence to challenge Mr. Sims' claim of self-defense, the prosecution instead advanced a speculative theory of motive, based on the contention that Mr. Sims was transporting narcotics at the time and killed Officer Stafford to avoid being caught violating his parole. The state's theory depended entirely upon testimony by Officer Silva that his dog "Jake" had "alerted" to the presence of narcotics during a sniff search of Mustipher's Cadillac conducted two full days after the shooting. (T. 1085). Counsel's inexcusable failure to object to this evidence, much less mount any substantive challenge to its admission, fell below any reasonable standard of competence and resulted in severe prejudice to Mr. Sims.

1. Counsel's Failure to Object to the Dog Alert Evidence Was Objectively Unreasonable Under Prevailing Professional Norms.

Any minimally competent capital defense lawyer in January 1994, when Mr. Sims' trial was held, would have perceived that the dog-alert evidence was objectionable and would have taken reasonable steps to prevent its use and, at a minimum, to preserve the issue for appeal. Mr. Sims' counsel did nothing.

Florida courts have held, in the Fourth Amendment search-and-seizure context, that a canine dog alert is not reliable without sufficient extrinsic corroboration, including evidence concerning (1) the exact training the detector

dog has received; (2) the standards or criteria employed in selecting dogs for training; (3) the standards the dog was required to meet to successfully complete his training program; (4) the prior "track record" of the dog based upon the number of false alerts or mistakes the dog has previously made. *Matheson v. State*, 870 So.2d 8, 15-16 (Fla. 2d DCA 2003) (adopting factors set forth in *State v. Foster*, 390 So.2d 469 (Fla.3d DCA 1980)). Consequently, a dog's alert can form an adequate basis for probable cause to conduct a search "only if the officer reasonably believes that the dog would *not* exhibit the alert behavior unless contraband was present." *Matheson*, 870 So.2d at 16. "The most telling indicator of what the dog's behavior means is the dog's past performance in the field." *Id*. Moreover, the burden is on the State, not the defendant, to prove sufficient evidence concerning the above factors to warrant a finding of probable cause. *Id.*

As the 1980 decision in *Foster* demonstrates, the legal basis for challenging the dog-alert evidence in Mr. Sims' case was readily apparent in Florida case law at the time of Mr. Sims' trial. Florida courts have long been wary of the reliability of canine alerts on the grounds that, *inter alia*, canine detection training programs "vary widely in their methods, elements, and tolerance for failure" and "dogs themselves vary in their abilities to accept, retain, or abide by their conditioning in widely varying environments and circumstances." *Matheson*, 870 So.2d at 14. A dog's powerful detection skills often lead them to alert to

residual scents that are up to four to six weeks old, *see Jennings v. Joshua Indep. School Dist.*, 877 F.2d 313, 317 (5th Cir. 1989); *Matheson*, 870 So.2d at 13, and even well-trained dogs with good track records may alert erroneously, *see, e.g.*, *United States v. Brown*, 731 F.2d 1491 (11th Cir. 1984) (no drugs found after narcotics dog alerted to luggage), *modified*, 743 F.2d 1505 (11th Cir. 1984).

Accordingly, this Court held as early as 1994 that scent-tracking evidence is admissible only after a showing of "character and dependability of the dog" and training of the officer handling the dog. *Green v. State*, 641 So. 2d 391, 394 (Fla. 1994), *cert. denied*, 513 U.S. 1159 (1995).[14] As a result, it is expected that counsel will assess and challenge the accuracy of a canine alert. *See, e.g.*, *United States v. Outlaw*, 134 F. Supp. 2d 807, 813 (W.D. Tex. 2001) (noting broad recognition of "a defendant's right to challenge the training and reliability of canine inspection teams").

Furthermore, the State here did not merely rely upon the dog-alert evidence to establish the predicate for a finding of *probable cause*, but rather touted that evidence to prove *beyond a reasonable doubt* that Mr. Sims actually had narcotics in Mustipher's Cadillac on June 11. The State had no other evidence

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[14] *See also United States v. Colon*, 845 F. Supp. 923, 928 (D.P.R. 1994) (absent evidence of strength-of-alert or general reliability of a canine, a hearing is required to determine if probable cause to arrest or search existed); *United States v. $67,220.00*, 957 F.2d 280, 285 (6th Cir. 1992) (dog alert evidence deemed "weak" absent testimony concerning animal's prior performance and reliability).

whatsoever that the car contained any narcotics: It was conceded by the State, and therefore undisputed, that no actual narcotics were found by police following Jake's alert (T. 1087), and the State offered no evidence that Mr. Sims had possessed illegal drugs at any time. Yet, despite both the novel use that the prosecution sought to make of the dog-alert evidence and the glaring unreliability of the evidence itself, Mr. Sims' counsel failed to object to its admission.

This failure had no rational strategic basis. It was obvious that the evidence would be extremely prejudicial to Mr. Sims, and nothing would have been lost by counsel requesting a hearing outside the jury's presence to challenge the reliability of Jake's alert. Nor was there any conceivable tactical reason for failing to demand that the State produce the specific evidence concerning Jake's past performance required to support its admission. Mr. Sims' counsel deposed Officer Silva well in advance of trial, yet never explored the issue of reliability and never demanded production of training- and performance-related documents.

In order to challenge the admissibility of the canine alert evidence, counsel should have sought records relating to the training, certification, and history of both the canine and his handler.[15] While counsel's failure to request the

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[15] "Defendants often request numerous canine records to examine the reliability of the canine involved in their cases." R. Bird, *An Examination of the Training and Reliability of the Narcotics Detection Dog*, 85 Ky. L. J. 405, 413 n.61 (Winter 1996/1997).

canine's record or his handler's certification was inexcusable, that failure was compounded by the lack of any objection at trial to the testimony of Officer Silva, thereby preventing Mr. Sims from raising the issue of its admissibility on direct appeal. *See Sims*, 681 So.2d at 1115 n.5 (noting lack of objection).

Moreover, even if the trial court had ruled that the evidence was sufficiently reliable under Florida law, competent counsel would have argued that the evidence nonetheless should be excluded because its probative value was far outweighed by its prejudicial effect. *See, e.g., Atkins v. Alabama*, 932 F.2d 1430, 1432 (11th Cir. 1991) (defense counsel's failure to object to admission of fingerprint card which mentioned defendant's prior arrest constituted ineffective assistance). Here, the State could not disprove the possibility of an innocent explanation for the presence of narcotic residue in the automobile. Indeed, Officer Silva himself conceded that Jake would alert to a prescription medication that contained or had been contaminated by a narcotic substance. (T. 1088-89). Nor could the State prove any temporal connection between the substance whose scent Jake detected and Mr. Sims' use of his cousin's car. While the probative value of Officer Silva's testimony was minimal at best, its admission caused severe prejudice to Mr. Sims by allowing the prosecution to paint him as a drug dealer fearful of being caught violating his parole. No competent counsel would have allowed this evidence to reach the jury without objection.

2. Counsel's Failure to Object to the Dog Alert Evidence Prejudiced Mr. Sims.

Counsel's failure to oppose the admission of the dog alert testimony not only constituted deficient performance but also caused sufficient prejudice to Mr. Sims to undermine confidence in the outcome of the guilt phase of his trial.

Mr. Sims' purported possession of drugs while on parole was a crucial component of the State's case; indeed, the prosecution's resort to a highly speculative theory of motive itself bespoke the State's inability to adduce other evidence contradicting Mr. Sims' account of events. Moreover, the admission of the dog-sniff evidence enabled the State to introduce – through the testimony of Mr. Sims' parole officer, Essie Lynn – the additional harmful evidence that Mr. Sims was on parole at the time of the shooting. *See Sims*, 681 So.2d at 1115 (holding that "parole status evidence is not independently admissible during the guilt phase of a capital trial," but "became relevant and admissible" against Mr. Sims "when it was linked to a motive for murdering the police officer). As this Court's decision on direct appeal recognized, the testimony of Ms. Lynn had no permissible foundation absent the admission of the objectionable dog-sniff evidence. *Id*. *See also United States v. Tumblin*, 551 F.2d 1001, 1004-05 (5th Cir. 1977) (error to allow prosecutor to emphasize defendant's frequent incarceration and recent release from prison, which did not merely attack defendant's credibility but implied he was a "bad seed"); *Fitzgerald v. State*, 227 So. 2d 45, 46-47 (Fla.

1969). The testimony of Ms. Lynn concerning Mr. Sims' parole status had a powerful prejudicial impact upon Mr. Sims' defense. *See Bozeman v. State*, 698 So. 2d 629, 631-32 (Fla. 1997) (recognizing prejudicial impact on trial of evidence suggesting a defendant has committed other crimes or bad acts).

The portrayal of Mr. Sims as a drug carrier was designed by the state to destroy Mr. Sims' credibility and formed a fundamental component of the State's case. This theory dominated the prosecutor's closing argument:

> Now of course, Mr. Pitts is going to tell you Essie Lynn is not important, forget her. Why does she come on? Why is she here? Because the defendant is on parole. Mr. Pitts knows what she's on, and I will tell you why she testified. Because there is a difference. There is a difference in if you have some drugs in the car and you're going to be arrested. *But between that and being on parole from state prison where you had been released just five weeks earlier and now you're transporting drugs, those are two different things, way different. ….*
>
> I proved to you why this defendant acted the way he did, through, by Essie Lynn. By forms. By drug dogs. *I proved to you that while you're on parole from state prison, just being released, transporting, possession of drugs is going to violate your parole. You can go back to state prison. You can go back to state prison.*

(T. 1419-20, 1436 (emphasis added); *see also* T. 1435, 1440, 1422).

Unimpeded by any objection from defense counsel, the prosecution hinged its entire attack on Mr. Sims' credibility to a theory of motive that should not have been permitted to get off the ground – namely, that Mr. Sims was transporting drugs when he was stopped by Officer Stafford. Based upon the

paltry evidence of a canine drug sniff, the State was able to introduced Ms. Lynn's testimony and paint Mr. Sims in closing argument as a desperate, ruthless, paroled drug dealer. The prosecutor returned again and again to this theme, ending his closing argument by urging the jury that they simply could not "believe a person who is convicted three times and on parole and has every reason to lie to you." (T. 1442). Counsel's unreasonable failure to take any steps to prevent this assault upon Mr. Sims' credibility, which was essential in presenting his claim of self-defense, clearly undermines the confidence in the outcome of the trial.[16]

B. Mr. Sims' Counsel Failed to Mount Any Competent Defense to the State's Crime-Scene Testimony.

Compounding the failure to challenge the dog-sniff evidence, Mr. Sims' counsel also failed to raise a minimally competent defense against the State's equally tenuous crime-scene testimony. Based upon testimony by a crime scene investigator and a firearms examiner, the prosecution contended at closing that the location of physical evidence at the crime scene contradicted Mr. Sims' account of the confrontation with Stafford:

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[16] In his Amended Rule 3.850 Motion, Mr. Sims proffered the testimony of one or more expert witnesses to establish the various factors that limit or eliminate the probative value of the canine alert testimony introduced by the State against Mr. Sims. In the alternative to his request for a new trial, Mr. Sims submits that this Court at a minimum should remand this case to the lower court for an evidentiary hearing to afford him an opportunity to develop the evidentiary basis for his ineffective-assistance claim on this issue.

> It's easy, as I told you in the beginning to defame the dead. The dead can't speak. But there are things left on the scenes of crimes which speak to you the same way. In this case, not only do they speak to you, but they cry out to you that the defendant lied. (T. 1438).

In reality, however, the crime scene evidence was consistent with Mr. Sims' account: For example, the location of the shell casings ejected from the gun did not undercut, but rather supported, Mr. Sims' testimony about his location when the gun discharged. [17]

The jury never heard any coherent response to the State's assertions, because Mr. Sims' counsel failed to take reasonable steps to present one. [18] Reasonably competent counsel would have retained a crime-scene reconstruction expert to assist them in cross-examining the prosecution's witnesses or to provide affirmative testimony supporting Mr. Sims and, consequently, could have demonstrated that the physical evidence undermined the state's own theory of the shooting. As a result of counsel's failure, the jury heard inaccurate and largely unrebutted characterizations of the crime-scene evidence, which further damaged

[17] The prosecution's own witnesses testified that the gun casings would eject toward the *right* of the shooter. (T. 1341). However, according to the prosecution's theory of Mr. Sims's location when the gun discharged (T. 998-99), the casings would have been to his *left*.

[18] Given that these witnesses were identified by the prosecution well before trial, Mr. Sims' counsel had notice that the crime scene evidence would be central to the state's case. Counsel should have responded by preparing appropriately.

Mr. Sims' credibility. This failure constituted ineffective assistance and severely prejudiced Mr. Sims.

C. Defense Counsel's Failure to Object to the Prosecutor's Improper Statements During Closing Argument Constituted Ineffective Assistance of Counsel.

Having failed to mount any opposition to highly objectionable components of the State's case, Mr. Sims' counsel also remained mute during closing argument despite a stream of offensive and patently improper remarks by the prosecutor. Counsel's failure to object to these remarks and thereby preserve Mr. Sims' fundamental right to a fair trial constituted ineffective assistance of counsel and, consequently, demands that Mr. Sims' conviction be vacated.

1. Defense Counsel Had a Constitutional Obligation to Protest Improper Remarks by the Prosecutor.

As this Court and the Florida appellate courts have repeatedly affirmed, prosecutors must adhere to the highest standards of professional conduct, because juries attach "particular significance" to the comments of prosecutors, especially comments reflecting "the prosecutor's personal beliefs." *Singletary v. State*, 483 So.2d 8, 10 (Fla. 4th DCA 1991). Prosecutors must "be ever mindful of their awesome power and concomitant responsibility ... [to] reflect a scrupulous adherence to the highest standards of professional conduct." *Martin v. State*, 411 So.2d 987, 990 (Fla. 4th DCA 1982). Improper prosecutorial argument can "utterly destroy the defendant's most important right under our system, the right to

the 'essential fairness of (his) criminal trial,'" *Peterson v. State*, 376 So.2d 1230, 1234 (Fla. 4th DCA 1979) (quoting *Dukes v. State*, 356 So.2d 873, 874 (Fla. 4th DCA 1978)),[19] and therefore constitutes a fundamental violation of due process. *See Davis v. Zant*, 36 F.3d 1538, 1549-50 & n.17 (11th Cir. 1994)

The Florida Bar's Rules of Professional Conduct explicitly prohibit expressions of personal opinion regarding the credibility of witnesses or the guilt of the defendant. Fla. Bar Reg. R. 4-3.4(e). *"Arguments in derogation of [Rule 4-4.3(e)] will not be condoned by the appellate court, nor should they be condoned by the trial court,* even absent objection." *Schreier v. Parker*, 415 So. 2d 794, 795 (Fla. 3d DCA 1982) (emphasis in original). Expressions of personal opinion made by prosecutors are especially egregious "because of the possibility that the jury will give special weight to the prosecutor's arguments, not only because of the prestige associated with the prosecutor's office, but also because of the fact-finding facilities presumably available to the office." *ABA Standards for Criminal Justice, The Prosecution Function*, 3-5.8, Comment (3d ed. 1993). *See also, Berger v.*

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[19] *Cf. United States v. Murrah*, 888 F.2d 24, 28 (5th Cir. 1989) (prosecutor's improper references to matters outside the record and attacks on the integrity of defense counsel substantially affected defendant's right to fair trial); *United States v. Rios*, 611 F.2d 1335, 1343 (10th Cir. 1979) (defendant denied fair trial where credibility was "controlling issue" and prosecutor improperly expressed personal belief in defendant's guilt and insinuated defense investigator contrived testimony).

United States, 295 U.S. 78, 88 (1935) (noting prosecutor's special obligations in criminal justice system).

This Court has also stated it is "unquestionably improper" for a prosecutor to assert that a defendant lied by reference to the prosecutor's personal experience, since "any trial lawyer should know that this type of conduct is completely beyond the limits of propriety." *O'Callaghan v. State*, 429 So. 2d 691, 696 (Fla. 1983).[20] Such ad hominem attacks are particularly improper and prejudicial when they are calculated to undermine the defendant's credibility and the "whole defense hinged" on the jury's determination as to the defendant's credibility. *See Peterson*, 376 So.2d at 1234.

No less improper are attacks by the prosecutor upon the personal integrity of defense counsel. For decades, this Court has recognized that the effect of a prosecutor's remarks questioning the honesty of defense counsel is not limited to the attorney, but is ultimately projected at and prejudices the defendant. *Adams*

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[20] *See also Connelly v. State*, 744 So. 2d 531, 533 (Fla. 2d DCA 1999) (noting that such conduct "is far beneath the level of integrity and professionalism prescribed by the Florida Bar's standards of professional conduct"); *Bass v. State*, 547 So.2d 680, 681-82 (Fla. 1st DCA), *review denied*, 553 So. 2d 1166 (Fla. 1989) (reversible error for prosecutor to argue that defendant lied when claiming self-defense, and to state that, in prosecutor's "many years" of experience, he continued to be "flabbergasted by the fact" that in every trial somebody lies under oath); *Singletary v. State*, 483 So.2d 8, 9-10 (Fla. 2d DCA 1985) (reversible error for prosecutor to call defendant a liar and to argue to the jury, "You know as well as I do that [the defendant] certainly intended to harm …[the victim] with that gun.").

v. State, 192 So.2d 762, 764 (Fla. 1966).[21] Such remarks are "wholly inconsistent with the prosecutor's role," *Redish v. State*, 525 So.2d 928, 931 (Fla. 1st DCA 1988), and constitute fatal error warranting reversal, *Adams*, 192 So.2d at 764.

The prejudice inflicted by the above improprieties is further exacerbated when the prosecutor asserts such personal opinions on the basis of purported "facts" outside the evidentiary record. *See, e.g.*, *Pacifico v. State*, 642 So.2d 1178, 1184 (Fla. 1st DCA 1994) (in rape case, improper for prosecutor to argue defendant shared characteristics of all rapists where such matters were not part of trial record); *Bass*, 547 So.2d at 682 (improper for prosecutor to bolster claim that defendant lied by asserting that people frequently lie under oath).

The Florida courts have repeatedly recognized that defense counsel's failure to object to such improper remarks results in constitutionally defective representation under *Strickland*. *See, e.g.*, *Eure v. State*, 764 So.2d 798, 801 (Fla. 2d Dist. Ct. App. 2000) (finding ineffective assistance based on counsel's failure to object to prosecutor's improper remarks during closing arguments); *Ross v. State*, 726 So. 2d 317 (Fla. 2d DCA 1998) (counsel ineffective for failing to object to

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[21] *See also State v. Cantlebarry*, 590 N.E.2d 342, 347-48 (Ohio App. 10 Dist. 1990) (prosecutor's comment in closing argument about defense counsel was not harmless prosecutorial misconduct, where prosecutor described defense counsel as attempting to mislead the jury through trickery, although there was no evidence of such introduced at trial).

improper closing argument where prosecutor ridiculed defendant, his defense, and defense witnesses). Especially in a death penalty case where the defense rests on the credibility of the defendant's testimony, no reasonably competent capital defense attorney would fail to object when the prosecutor repeatedly maligns the defendant as a liar and accuses defense counsel of deliberately misleading the jury. Yet that is exactly what happened here.

2. Defense Counsel's Failure to Object to the Prosecutor's Improper Remarks Was Unconstitutionally Incompetent and Prejudiced Mr. Sims.

"*[T]his defendant should be dead*." (T. 1428): The prosecutor literally told the jury that Officer Stafford should have killed Merrit Sims in cold blood when he had the chance – even though there was no evidence in the record that, prior to grabbing Stafford's gun, Mr. Sims had done anything warranting the use of deadly force against him.[22] Defense counsel failed to object either to this bloodthirsty comment or to any of the prosecutor's numerous other violations of the well-established rules of proper conduct.

[22] To the contrary, the only eye-witness testimony was that, even after Mr. Sims hit Officer Stafford on the head with Stafford's radio, Stafford re-established control over Mr. Sims, who was heard crying out, in an emotional, pleading tone, "You got me, man," and was not resisting arrest. This was the uncontradicted testimony of the State's own witness, Farid Batule. (T. 969). The prosecutor's assertion that Stafford "should have killed" Mr. Sims after being struck with the radio, and that "there is not a thing any one of us would have said about it" if he had (T. 1428), was nothing short of outrageous.

The prosecutor's closing argument was pervaded with ad hominem attacks on the character of both Mr. Sims and his counsel, bolstered by blatant misstatements of the record and patently improper expressions of personal opinion based on purported facts outside the record. The prosecutor told the jury that he personally was "real tired" of "hearing, in the 12 years I have been doing this, that every officer says, 'I am going to kill you'" (T. 1428), lumping Mr. Sims with an unidentified group of criminal defendants as to whom no evidence had been offered (nor would any such evidence have been permissible, *see, e.g.*, *Dorsey v. State*, 350 A.2d 665, 669-70 (Md. 1976)). In effect, the prosecutor himself *testified* in closing argument that, as a matter of fact, Mr. Sims' testimony was nothing more than a common false refrain spoken by the many despicable cop-killers that the prosecutor had encountered in his "12 years" of service to the State. The well-established case law at the time left no doubt that this commentary based on purported facts outside the record was not fair or proper argument.

While the prosecutor attempted to elevate himself with personal testimonials – declaring at one point that "I don't really care what Charles Stafford did for a living. I sort of care that he was a human being." (T.1441) – he also sought to denigrate and impugn the integrity of not only Mr. Sims but also his counsel. The prosecutor repeatedly derided Mr. Sims as a "liar" and his testimony as "lies." (T. 1424, 1442; *see also* 1416-17, 1425, 1433). At the same time, he

accused defense counsel of "rehearsing" Mr. Sims and coaching his purported perjury. (T. 1437). The prosecutor further assailed Carter and Pitts for deliberately "misleading" the jury – unmistakably insinuating to them that Mr. Pitts "*want[s] to* mislead you" (T. 1437 (emphasis added)) – on the basis of factual assertions that, in reality, were unfounded and directly contradicted by the record. *See supra* part I (C). While castigating Mr. Sims and his lawyers as dishonest manipulators, the prosecutor improperly attempted to capitalize on the status of his office, claiming that the courtroom motto, "We who labor here seek only the truth," applied only to him and that, as a laborer for the State, he "can't make up evidence" (T. 1441). The inference was obvious: Mr. Sims and his counsel are lying to you, but I, a public servant, am telling you only the truth.

Such "attacks on the personal integrity of opposing counsel" were "wholly inconsistent with the prosecutor's role." *Redish*, 525 So.2d at 931. The combination of the prosecutor invoking his personal experience, repeatedly calling Mr. Sims a liar, and impugning the integrity of his counsel was calculated to destroy Mr. Sims' credibility, in a case that hinged totally on persuading the jury to believe him. (*See* T. 1430 (prosecutor's statement that "[i]f you believe him to be a liar, this case is over.")). Mr. Sims' counsel's failure to object to the prosecutor's comments was a "substantial and serious deficiency measurably below that of competent counsel" and deprived Mr. Sims of the proper legal representation to

which he was constitutionally entitled. *Knight v. State*, 394 So.2d 997, 1001 (Fla. 1981). With ample authority on his side, any objectively reasonable defense attorney would have objected to the prosecutor's impermissible tactics.

There is no rational strategic justification for this failure by Mr. Sims' counsel. Counsel's attempts in his closing argument to rebut the prosecutor's attacks were well-intended, but fundamentally inadequate. First, by objecting promptly to the prosecutor's improper remarks, Mr. Sims' counsel could have prevented their continuation and most of the resultant unfair taint upon Mr. Sims. Furthermore, a successful objection should have resulted in a curative admonition by the trial court, chastising the prosecutor in front of the jury and thereby counteracting the effect of his remarks. Second, even if the court had overruled counsel's objections, the objections would have preserved the issue for direct appeal – which Mr. Sims' counsel indisputably failed to do, *see Sims*, 681 So. 2d at 1116-17. In the face of such repeated inappropriate remarks, no mere tactical hesitation to interrupt the prosecutor's closing argument by raising objection could possibly justify counsel's inaction.

Defense counsel's failure to object to the prosecutor's improper remarks falls below any meaningful standard of reasonable professional performance. The resultant prejudice to Mr. Sims is not only inherent in the unfairness of the remarks themselves but also manifest in this Court's opinion on

direct appeal, which held that Mr. Sims was barred from challenging the remarks directly as a result of his counsel's inaction. *See id*. Because counsel's failure was objectively unreasonable under the circumstances and caused prejudice to Mr. Sims, Mr. Sims' conviction should be overturned.

II. MR. SIMS WAS DENIED HIS CONSTITUTIONALLY PROTECTED RIGHT TO EFFECTIVE COUNSEL BECAUSE OF ARTHUR CARTER'S UNDISCLOSED CONFLICT OF INTEREST.

The woefully deficient performance of one of Mr. Sims' lawyers, Arthur Carter, can be partially explained by the fact that during his representation, he was under investigation by multiple parties for billing improprieties in court-appointed cases. Carter's awareness of this investigation created a strong incentive for Carter to minimize the time and expenses he incurred in defending Mr. Sims in order to avoid further scrutiny of his billing practices. The resultant conflict of interest not only explains Carter's constitutionally deficient performance throughout the trial, but independently serves as grounds for a new trial.

The Sixth Amendment right to effective assistance of counsel includes the right to representation that is free of conflicts of interest. *Wood v. Georgia*, 450 U.S. 261, 271 (1981); *Burden v. Zant*, 871 F.2d 956, 957 (11th Cir. 1989); *Thomas v. State*, 785 So.2d 626, 628 (Fla. 2d Dist. Ct. App. 2001). As a result, an attorney's actual conflict of interest during the representation of a criminal defendant can constitute ineffective assistance of counsel. To assess whether an

attorney's conflict of interest violates the Sixth Amendment, Florida courts inquire (1) whether the defendant's attorney labored under a conflict of interest, and (2) whether the attorney's performance at trial was adversely affected as a result. *Mickens v. Taylor*, 535 U.S. 162, 172 n.5 (2002); *Herring v. Sec'y, Dep't of Corrs.*, 397 F.3d 1338, 1357 (11th Cir. 2005).

The record supports Mr. Sims' claim as to each prong. As to the first, the law is clear: An attorney must avoid situations in which his interests and his client's interests diverge. *Burnside v. State*, 656 So.2d 241, 243-44 (Fla. 5th Dist. Ct. App. 1995) ("A situation in which the attorney's own interests diverge from those of the client presents the same core problem presented in the multiple representation cases: the attorney's fealty to the client is compromised." (internal quotation omitted)). The Rules Regulating the Florida Bar require an attorney to avoid situations in which the representation of a client will be compromised by the lawyer's loyalties to others, including himself. Under Rule 4-1.7(b), "A lawyer shall not represent a client if the lawyer's exercise of independent professional judgment in the representation of that client may be materially limited by the lawyer's responsibilities to another client … or by the lawyer's own interest."[23]

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[23] The only exception to this rule occurs when "(1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation." Fla. Bar Rule 4-1.7(b). Carter could not reasonably (continued…)

Throughout his representation of Mr. Sims, Carter was materially limited by his own interest in minimizing expenditures and avoiding scrutiny of his billing practices. As a result of a series of Miami Herald stories, various agencies, including the Florida Bar and the State Attorney's office, began investigating Carter for fraudulent billing in court-appointed cases. *See* ROA 216; Jeff Leen & Don Van Natta, Jr., "*Attorneys For Poor Probed*," Miami Herald, Apr. 15, 1992, at 1A. Compounding the situation was the fact that Judge Carney was appointed to a "Bench-Bar" Commission established to investigate the accusations raised in the Miami Herald stories and recommend changes to the system to prevent future abuses. (ROA 210). These investigations into Carter's conduct were not resolved until well after Mr. Sims' trial. Ultimately, Carter was suspended from the Florida Bar due to these allegations. (ROA 751).

The combination of open criminal investigations into his billing practices and a judge who Carter knew was involved in the investigation created a strong incentive for Carter to keep costs low to curtail further scrutiny. But capital murder cases – at least if they are competently defended – demand the retention of outside investigators and experts, as well as time-consuming independent

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have believed that avoiding the routine and necessary expenses of defending a capital case would not adversely affect a defendant in Mr. Sims' circumstances. Carter never consulted Mr. Sims about their conflicting interests and Mr. Sims never consented to continued representation.

investigation by the attorney himself. Thus, Carter's self-interest militated against his solemn obligation to fight for Mr. Sims' life.

Rule 4-1.7(b) of the Florida Bar Rules requires attorneys to avoid such situations where the attorney's interests run contrary to his client's. Moreover, courts have recognized that a criminal defense attorney faces a conflict when – as was the case here – the attorney is under investigation by the same entities prosecuting his client. *See United States v. McLain*, 823 F.2d 1457, 1463-64 (11th Cir. 1987), *overruled in part on other grounds, United States v. Watson*, 866 F.2d 381, 383 n.4 (11th Cir. 1989). *See also Thompkins v. Cohen*, 965 F.2d 330, 332 (7th Cir. 1992) (an attorney facing prosecution has the incentive to pull his punches to avoid retaliation by the prosecutor).

As to the second prong of the test for an actual conflict of interest, "a defendant must demonstrate: (a) that the defense attorney could have pursued a plausible alternative strategy, (b) that this alternative strategy was reasonable, and (c) that the alternative strategy was not followed because it conflicted with the attorney's external loyalties." *Quince v. Crosby,* 360 F.3d 1259, 1264-65 (11th Cir. 2004) (*quoting Reynolds v. Chapman*, 253 F.3d 1337, 1343 (11th Cir. 2001)) (internal quotation marks omitted). Although Judge Carney did not grant an evidentiary hearing on Mr. Sims' conflict-of-interest claim, the record of this case is replete with errors and failures committed by Carter that have no reasonable

strategic basis. These errors began in the guilt phase of the trial, but were inescapably obvious during the penalty phase where Carter had sole responsibility. Even in the absence of an evidentiary hearing specifically directed at Carter's conflict, this Court can fairly conclude, on the basis of the record facts and the undisputed public record, that Carter failed to pursue these alternatives because he wished to minimize further scrutiny of his billing practices.

Thus, this Court should either grant Mr. Sims' request for a new trial, or remand the case with instructions to the lower court to conduct an evidentiary hearing on the conflict-of-interest issue.[24]

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[24] Given the publicity surrounding the Miami *Herald* stories and Judge Carney's role on the Bench-Bar Commission, it is likely that Judge Carney was aware of Carter's conflict at the time. Judge Carney therefore had a duty to inquire about Carter's conflict of interest. *Cuyler v. Sullivan*, 446 U.S. 335, 346 (1980). *See also Brownlee v. Haley*, 306 F.3d 1043, 1063 (11th Cir. 2002); *Tonneatti v. State*, 805 So.2d 112, 115 (Fla. 4th Dist. Ct. App. 2002). Judge Carney failed to conduct such an inquiry in this case and as a result, Mr. Sims was denied the effective assistance of counsel. Because the extent of Judge Carney's knowledge of Carter's conflict of interest was a material fact in Mr. Sims' Rule 3.850 motion, Mr. Sims moved for Judge Carney's recusal from his post-conviction proceedings, including his motion for disqualification. *See* § 38.01 Fla. Stat. (1997) (requiring recusal if judge "is a material witness for or against one of the parties"); *see also Bundy v. Rudd*, 366 So.2d 440, 442 (Fla. 1978) (judge presented with disqualification motion "shall not pass on the truth of the facts alleged nor adjudicate the question of disqualification") (internal citations and quotation marks omitted). Judge Carney's unsworn statements from the bench at the *Huff* hearing therefore cannot form a proper basis for denial of Mr. Sims' disqualification motions. Instead, he should have granted those motions and recused himself, but did not. Should this Court grant a remand for an evidentiary hearing on this issue, Mr. Sims respectfully requests that the remand include a direction to assign the matter to a different judge.

III. MR. SIMS WAS DENIED HIS CONSTITUTIONALLY PROTECTED RIGHT TO EFFECTIVE COUNSEL DURING THE PENALTY PHASE OF HIS TRIAL.

A. Carter's Failure to Investigate and Develop Mental Health Mitigation Evidence was Ineffective Assistance and Prejudiced Mr. Sims.

It is well established that defense attorneys have an obligation to rigorously investigate and develop mitigation evidence during the sentencing phase of a trial. This obligation is heightened in capital cases. "'[A]n attorney has a strict duty to conduct a reasonable investigation of a defendant's background for possible mitigating evidence,'" including evidence concerning the defendant's mental condition. *Ragsdale*, 798 So.2d at 716 (quoting *Riechmann v. State*, 777 So.2d 342, 350 (Fla. 2000)). To be reasonable, an attorney's investigation must be "meaningful[]," not superficial or perfunctory. *See Rose v. State*, 675 So.2d 567, 572 (Fla. 1996).

Both the Florida Supreme Court and the United States Supreme Court have held that in order to make a strategic choice about the amount and type of mitigation evidence to present in a capital case, the attorney must first conduct a rigorous investigation into available evidence. *Wiggins v. Smith*, 539 U.S. 510 (2003). A lawyer cannot make a reasonable strategic decision not to present such evidence to the jury unless he has first investigated his options, learned of the mitigating evidence, and then made a reasonable choice between them. *See Rose*, 675 So.2d at 572-73 (citing *Horton v. Zant*, 941 F.2d 1449, 1462 (11th Cir. 1991));

Bolender v. Singletary, 16 F.3d 1547, 1558 (11th Cir. 1994) (quoting *Stevens v. Zant*, 968 F.2d 1076, 1083) ('"[A]n attorney must have chosen not to present mitigating evidence after having investigated the defendant's background, and that choice must have been *reasonable* under the circumstances.'"). In assessing an attorney's performance, a court must "focus on whether the investigation supporting counsel's decision not to introduce mitigating evidence of [the defendant's] background *was itself reasonable*." *Wiggins*, 539 U.S. at 523 (emphasis in original). 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." *Id.* at 527. If counsel's "failure to investigate thoroughly resulted from inattention, not reasoned strategic judgment," the attorney was ineffective. *Id*. at 526.

The evidence presented at the Rule 3.850 evidentiary hearing overwhelmingly established that Carter's performance in preparing for and presenting evidence at the penalty phase was grossly deficient. Carter's failure to retain or even consult with a mental health professional to develop psychological testimony was a particularly egregious failure that had an obvious and dramatic impact on the outcome of Mr. Sims' trial.

1. Carter's Failure to Retain or Even Consult with A Mental Health Expert Was Ineffective Assistance.

As this Court has observed, mental health evidence can constitute "a mitigating factor of the most weighty order" and "'has the potential to totally change the evidentiary picture.'" *Rose*, 675 So.2d at 573 (quoting *Middleton v. Dugger*, 849 F.2d 491, 495 (1988)). The value of such evidence is highlighted by Florida capital sentencing statute, which expressly sets forth two statutory mitigating factors hinging upon the defendant's psychological and emotional condition at the time of the offense. *See* Fla. Stat. § 921.141(6)(b), (f) (1989). Accordingly, this Court has held repeatedly that the failure to investigate and prepare expert mental health evidence can constitute ineffective assistance. *See Ragsdale*, 798 So.2d at 716; *Rose*, 675 So.2d at 571-73; *Phillips v. State*, 608 So.2d 778, 783 (Fla. 1992); *State v. Lara*, 581 So.2d 1288, 1289 (Fla. 1991).

Despite the importance assigned to mental health testimony, it is undisputed that Carter never sought the testimony or advice of a mental health professional in this case. (ROA 1182). In fact, Carter conceded that he had no mental health evidence to support his mitigation arguments to the jury and court – despite that his admitted strategy was to portray Mr. Sims as acting under duress at the time of the shooting. (ROA 1204-10).

In evaluating this failure, the court concluded that there was "nothing in this record to show the need" for such an evaluation. (ROA 927). Based on no

factual findings or analysis, this conclusory legal ruling simply failed to address the evidence, which included innumerable clear signals that a mental health examination of Mr. Sims could prove fruitful. Though preliminary and incomplete, the Geller investigation materials contained numerous indications that a mental health examination was warranted. The report noted in several places that Mr. Sims had suffered a series of head injuries, beginning in near-infancy, including (i) a head injury requiring hospitalization at age 2 or 3 after he was struck by an automobile, and (ii) a series of accidents in which Mr. Sims "ran into the back of a car and knocked himself out on a bike"; "[fell] out of a tree and knocked himself out"; and [fell] off a motorcycle twice injuring his head." (DX C § 5). The interview notes compiled by Geller also strongly indicated that Mr. Sims had been emotionally traumatized by his father's death in 1989 and clearly pointed to the need for a mental health examination. These notes reported, *inter alia*, several statements by Mr. Sims' family members that Mr. Sims was devastated by his father's death; that "Merrit's troubles began when his father died"; and that "Merrit seemed to lose control, and one thing after another began to happen" following his father's death. (DX C §§ 7, 8, 10).

Furthermore, both the State and the court acknowledged at the time that Mr. Sims was entitled to be examined by a mental health expert (T. 1480), and Carter testified at the Rule 3.850 hearing that he believed the court would have

granted funds for a mental health examination. (ROA 1179). In a capital case, there was no legitimate reason not to consult a mental health professional.[25]

Under such circumstances, no reasonably competent capital defense attorney would have completely missed these signals or failed at least to consult with a mental health professional to explore possible mitigation. As Mr. Potolsky testified, Mr. Sims' history of head trauma alone should have prompted Carter to pursue, at a minimum, some "[c]onsultation with a qualified mental health professional to see what, if any, mitigation would exist." (ROA 1316). Similarly, "[f]rom a mental health standpoint, it would certainly be apparent to any reasonably effective lawyer that there could be a link" between the descriptions of Mr. Sims' emotional trauma and decline precipitated by his father's death and a mitigated psychological explanation of the offense. (ROA 1318). Thus, prevailing professional norms required a reasonable investigation of mental health-related

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[25] This was not a situation in which Carter could have chosen to forgo a mental health examination out of concern that negative information would have been revealed. Carter himself testified that there was "no risk involved in hiring a mental health professional as a consultant" because defense counsel would have been under no obligation to disclose the findings of the examination to the State had they been unfavorable. (ROA 1244; *see also* ROA 1305 (Potolsky) (no risk because any adverse findings are privileged and need not be disclosed)). Nor was this a situation in which the defendant instructed his counsel not to investigate mitigation evidence or was uncooperative with counsel. To the contrary, Mr. Sims was cooperative and supportive of the effort to develop mitigation evidence. (ROA 1179-80). *See, e.g.*, *Ragsdale*, 798 So.2d at 716 (cooperative defendant; ineffective assistance found).

mitigation, including a mental health examination for Mr. Sims. *E.g.*, *Ragsdale*, 798 So.2d at 715-22 (counsel ineffective for failing to investigate mental health evidence regarding physical abuse by father, drug and alcohol abuse, and history of head trauma); *Rose*, 675 So.2d at 572 (same); *Baxter v. Thomas*, 45 F.3d 1501, 1513 (11th Cir.), *cert. denied*, 516 U.S. 946 (1995).

At the Rule 3.850 hearing, Carter testified that he ignored these signals – even though he admittedly had no training or expertise as a mental health expert (ROA 1186) – because he just did not "see the need" for mental health testimony (ROA 1181-83). This uneducated decision was the product of ignorance and inattention, not strategy or choice. Indeed, Carter acknowledged that his own strategy during the sentencing phase focused on demonstrating to the jury that Mr. Sims acted "under duress" at the time of the shooting. (ROA 1204). Yet Carter admitted point-blank that he collected no psychological evidence to support this contention and had *no strategic basis* for not doing so. (ROA 1209-10). Similarly, following the jury recommendation, Carter's sentencing memorandum argued that "the death of the defendant's father devastated the defendant," suggesting that Mr. Sims' psychological and emotional condition should be considered as a mitigating factor in his sentencing. (ROA Dir. 544; ROA 1209). Again, however, Carter acknowledged that he provided no evidence whatsoever to support that assertion, and that he had *no strategic reason* for that failure. (ROA 1209).

The fact that Carter actually attempted to utilize mental health evidence as a mitigator alone negates the Circuit Court's unsupported pronouncement that there was "nothing" in the record suggesting the need for mental health examination. *See State v. Coney*, 845 So.2d 120, 130 (Fla. 2003). Carter's failure to investigate mental health mitigation evidence cannot be characterized as a "strategic choice" under well-established law. *See Ragsdale*, 798 So.2d at 716 ("[S]ince counsel did not conduct a reasonable investigation, he was not informed as to the extent of the child abuse suffered, and thus he could not have made an informed strategical decision not to present mitigation witnesses."); *Duncan v. State*, 894 So.2d 817, 825 (Fla. 2004) (new sentencing phase trial warranted based on counsel's failure to present mental health-related evidence); *Wiggins*, 539 U.S. at 526 (counsel ineffective because the "failure to investigate thoroughly resulted from inattention, not reasoned strategic judgment").

2. Carter's Failure to Present Mental Health Evidence Prejudiced Mr. Sims.

Carter's failure to develop mental health testimony had an obvious and prejudicial impact on the outcome of the trial. The testimony of Dr. Golden at the evidentiary hearing demonstrated that there was a wealth of mental health-related mitigation evidence that should have been developed and presented. A reasonable probability clearly exists that a different outcome would have resulted had this evidence been available to the jury.

Dr. Golden testified that Mr. Sims suffered from a clinically significant mental health disorder that affected his ability to normally process information during stressful episodes. "[T]he combination of the depression, of the stressors, of the feeling that he was a failure all made [Mr. Sims] much more susceptible to stressful events." (ROA 1055). Thus, when confronted by the physically dominating and aggressive Officer Stafford, Sims became "terrified" and overwhelmed, "[making it] very difficult for him to focus, very difficult for him to concentrate, very difficult for him to overcome those fears and terrors that were rising up inside him." (ROA 1059-61). The situation "impair[ed] his judgment tremendously [that] [h]e would be reacting instinctively at best rather than thinking through what he was doing and how he was doing it." (ROA 1061). Had Carter presented a mental health expert, he would have been able to show that Mr. Sims "was under extreme emotional disturbance at [the] time [of the crime]" and "did not appreciate the criminality of what he was doing at the time that he was doing it," thus satisfying two statutory mitigating factors under Florida law. (ROA 1062-63).

Under similar circumstances, both the U.S. Supreme Court and the Florida Supreme Court have granted defendants new penalty phase trials. For example, in *Wiggins v. Smith*, 539 U.S. 510 (2003), the U.S. Supreme Court ordered a new penalty phase trial because counsel failed to investigate, develop, or

present evidence about the defendant's history of abuse and mental health disorders. Similarly, in *Ragsdale v. State*, 798 So.2d at 715-16, 719-21, this Court vacated a death sentence on grounds of ineffective assistance, where Ragsdale's counsel had failed to discover or present evidence that Ragsdale had been physically abused by his father, had abused drugs and alcohol, and had a history of severe head injuries. In *State v. Lewis*, 838 So.2d 1102 (Fla. 2002), this Court concluded that a new penalty phase trial was necessary because – although counsel did retain a mental health expert – he waited two weeks following the conviction to do so. *See also Rose*, 675 So.2d at 571 (counsel's performance was deficient for failing to investigate, discover or present evidence of the defendant's history of childhood abuse, chronic alcoholism and psychological problems, including "a longstanding personality disorder"); *Lara*, 581 So.2d at 1289 (performance of penalty-phase counsel was constitutionally deficient because counsel had failed to investigate and discover the defendant's history of mental illness and had failed to "'properly use expert witnesses regarding defendant's psychological state'").

As Mr. Potolsky testified, had Carter retained a mental health expert, he would have been in a position to present "a far more mitigated version of the events." (ROA 1321). Given the numerous indications that mental health testimony was necessary, and given that Carter's own strategy relied on

psychological factors, the failure to investigate, develop, and present mental health testimony denied Mr. Sims' constitutional right to effective counsel.

B. Carter's Lack of Preparation and Abysmal Performance During the Penalty Phase Was Ineffective Assistance and Prejudiced Mr. Sims.

The Rule 3.850 hearing record clearly demonstrates that Carter also did virtually nothing to investigate or develop sources of mitigation other than mental health evidence. Carter expended no meaningful time or effort preparing either himself or his witnesses, and his performance on behalf of Mr. Sims fell far below prevailing standards.

1. Carter Failed to Investigate and Develop Key Fact Witness Testimony.

As this Court has held, "[e]mployment history and positive character traits are also relevant factors to be considered in mitigation since these factors may show potential for rehabilitation and productivity within the prison system." *Stevens v. State*, 552 So.2d 1082, 1086 (Fla. 1989); *see also Cooper v. Dugger*, 526 So.2d 900, 902 (Fla. 1988). For this reason, counsel has an obligation to investigate "the defendant's background, education, employment record, mental and emotional stability, family relationships." *ABA Standards for Criminal Justice*, Guideline 4-4.1, Commentary (3d ed. 1993). Failure to conduct a rigorous investigation into sources of possible mitigation evidence constitutes ineffective assistance of counsel. *E.g.*, *Strickland*, 466 U.S. at 691 ("counsel has a duty to

make reasonable investigations …"); *Wiggins*, 539 U.S. at 522; *Stevens v. State*, 552 So.2d 1086-87.

Although Carter was solely responsible for preparing and conducting the penalty phase case, his entire pre-penalty phase investigation consisted of little more than reviewing a superficial, and obviously preliminary, set of mitigation materials compiled by Geller. Carter never met or even spoke with Geller regarding the contents of those materials. (ROA 1174-76). Despite the statements in the Geller materials indicating the need for and offering follow-up, Carter never requested any additional investigation from Geller or anyone else. (ROA 1178).

As the invoice attached to the materials makes clear, Geller ended his preliminary investigation as soon as the $1000 that Carter had requested from the Court ran out. (DX C § 25; ROA 1178). Although the Court previously had offered Carter $3000 for mitigation investigation, he requested only $1000 for investigative costs. (T. 203-04). Carter testified at the evidentiary hearing that, although he believed the Court would grant additional funds upon his request, he never made any such request. (ROA 1179).

A reasonable capital defense counsel cognizant of prevailing norms would have treated the materials compiled by Geller as merely "a starting point" but "[b]y no means … [a] final competent investigation into mitigation." (ROA 1309 (Potolsky)). The witness summaries in the materials compiled by Geller

were essentially devoid of meaningful detail, and many of the summaries consisted of no more than a few sentences. (*E.g.*, DX C § 11, 14). Time and again, Geller noted that "additional attempts can be made should you request." (DX C §§ 15, 16, 17, 19, 22, 23, 24). Yet Carter never requested any such follow-up, even though the relatively sparse materials compiled by Geller contained promising mitigation leads. Though the report identified the names of Mr. Sims' former co-workers, supervisors, and employers, Carter did nothing to follow up on the leads. (DX C § 5, 8). "[A]ny reasonably effective lawyer after receiving this binder would have either sat down with the investigator and given the investigator additional instructions or conducted those additional tasks on his own." (ROA 1312 (Potolsky)).

Due to Carter's failure to investigate, the penalty phase proceeding was almost entirely devoid of testimony concerning Mr. Sims' employment history. The sole reference to work history during the entire penalty-phase proceeding was a passing reference to the fact that Mr. Sims worked at a McDonalds restaurant during high school. (T. 1522). Had Carter conducted an even minimal investigation, however, he would have discovered an abundance of useful additional information concerning Mr. Sims' work and educational background. Following high school, Mr. Sims held jobs with two construction companies for multi-year periods, earning a promotion to foreman and exercising

substantial responsibility on large high-rise construction projects. (ROA 1269-72). Even during his incarceration, Mr. Sims participated in voluntary prison work programs. (ROA 1273).

Stanley Thomas, a supervisor of Mr. Sims for three years, testified at the evidentiary hearing that Mr. Sims was an honest and hardworking employee who "escalated real fast" from the ranks of a construction site helper to a site supervisor. (ROA 967-73). Mr. Thomas testified that Mr. Sims effectively managed a team of subordinates, got along well with his co-workers, and left the company on good terms. (ROA 969-70, 972). Prior to the penalty phase trial, Mr. Thomas informed Mr. Sims that he was willing to testify, but no one ever contacted him. (ROA 974-75). Moreover, had Carter contacted Mr. Sims' co-workers, he would have had "a courtroom full … of people who wanted to testify for him …." (ROA 975).

Similarly, the former teachers of Mr. Sims, Timmie Terry and Rosylen Cox, testified at the Rule 3.850 hearing and portrayed Mr. Sims as a "soft spoken," "quiet," and "sweet" boy who was not aggressive and went out his way to avoid physical confrontations. (ROA 1153-55, 1137). Both Terry and Cox were available to testify at Mr. Sims' trial, but were never contacted by Carter. (ROA 1141-42, 1158-59).

No reasonable strategic justification can be offered for Carter's failure to investigate and present these witnesses. In fact, Carter admitted that these failures were not the result of informed decisions or strategic choices. This was not a situation where Carter made an informed, strategic decision that mitigation evidence would open the door to potentially negative testimony. *See, e.g.*, *Wiggins*, 539 U.S. at 525 ("counsel uncovered no evidence in their investigation to suggest that a mitigation case … would have been counterproductive"). Nor would this evidence have been cumulative to that actually presented at trial. Instead, the testimony of Sims' co-workers and teachers would have provided the jury with fresh insights into Mr. Sims' character and potential for rehabilitation. The testimony of Terry and Cox would have provided the jury with a clear alternative picture of Mr. Sims as a quiet, passive teenager who was unlikely to initiate, but easily overwhelmed by, physical confrontation. Moreover, this testimony was consistent with the personality disorder described by Dr. Golden and would have reinforced the mitigated, sympathetic account of Mr. Sims' conduct that Carter utterly failed to present.

2. Carter's Preparation for the Penalty Phase Trial Was Inexcusably Poor and Prejudiced Mr. Sims.

Compounding Carter's ineffective investigation, the evidence adduced during the Rule 3.850 hearing demonstrated that Carter put virtually no effort into preparing for the penalty stage trial. As this Court has repeatedly stated, "the

obligation to investigate and prepare for the penalty portion of a capital case cannot be overstated – this is an integral part of a capital case." *State v. Lewis*, 838 So.2d 1102, 1113 (Fla. 2002). Accordingly, "'[i]t should be beyond cavil that an attorney who fails altogether to make any preparations for the penalty phase of a capital murder trial deprives his client of reasonably effective assistance of counsel by any objective standard of reasonableness.'" *Stevens*, 552 So.2d 1087 (quoting *Blake v. Kemp*, 758 F.2d 523, 533 (11th Cir.), *cert. denied*, 474 U.S. 998 (1985)); *see also Sochor v. State*, 883 So.2d 766, 772 (Fla. 2004) (counsel's performance was deficient because he "put little time or effort into preparing expressly for the penalty phase").

In the instant case, the record demonstrates that Carter spent no meaningful time preparing his case or his witnesses. Carter failed to show up for the scheduled depositions of two of his key mitigation witnesses, and had no substantive contact with the witnesses until the day they were scheduled to testify. (ROA 1199). Worse yet, Carter spent no time with witnesses preparing them for their testimony before the day of the trial – including Mr. Sims. Carter never met with Mr. Sims to prepare for the penalty phase. Further, by Carter's own admission, the only time he spent with the mitigation witnesses were five-minute conversations in the courthouse hallway immediately before the witness testified. (ROA 1200, 1279). As a result of this lack of preparation, Carter's witness

examinations and presentations to the jury were perfunctory and at times affirmatively unhelpful to Mr. Sims.

Indeed, the entire direct examination of Mr. Sims himself comprises only four transcript pages; the other witness examinations consumed between three and six pages of the transcript. (*e.g.*, T. 1543-46). *Cf. State v. Lara*, 581 So.2d 1288, 1289 (Fla. 1991) (granting new penalty phase hearing based in part on deficient witness examinations and noting that counsel's main penalty phase witness's cursory testimony consumed only "seven pages in the transcript."); *Collier v. Turpin*, 177 F.3d 1184, 1201 (11th Cir. 1999) (counsel was ineffective because "examination of the witnesses was minimal," and "elicit[ed] very little relevant information about [the defendant's] character"). In addition, Carter's examinations often elicited misleading and harmful information about Mr. Sims. For example, his questions prompted one witness to testify – much to Carter's surprise – that Mr. Sims had used drugs and been in a fight in high school. (T. 1498). Furthermore, prompted by Carter's questioning, several witnesses testified that they opposed the death penalty as a matter of principle. (T. 1499, 1503, 1510-11, 1522). This testimony undermined any beneficial impact of these witnesses' testimony because it highlighted their belief that Mr. Sims should not be sentenced to death no matter how heinous his crime. Such questions are a common cross-examination a tactic of the *prosecution* in death-penalty cases, designed to

neutralize the witnesses' plea for life; yet Carter inexplicably did the State's job for it. (ROA 1335-36 (Potolsky)). Carter's purblind missteps were objectively unreasonable under any meaningful standard. *Cf. Horton v. Zant*, 941 F.2d 1449, 1463 (11th Cir. 1991).

3. Carter Inexcusably Failed to Object to State's Proposed Aggravating Factors.

In addition to his deficient preparation and presentation of testimony at the penalty phase trial, Carter failed entirely to object to any of the State's asserted statutory aggravators, even though at least one of those factors clearly was subject to challenge at the time. The State argued to the jury and the Circuit Court that the fact that Mr. Sims was on controlled release at the time of the crime satisfied the "under sentence of imprisonment" aggravator." *See* (ROA Dir. 1494). However, it was not until 1997 – three years after Mr. Sims' penalty trial – that this Court decided, in *Davis v. State*, 698 So.2d 1182 (Fla. 1997), that controlled release constitutes a "sentence of imprisonment." The *Davis* Court expressly stated that "[w]e have not ruled on this precise issue before." *Id*. at 1193. In fact, in *Trotter v. State*, 576 So.2d 691, 694 (Fla. 1990), this Court had held that "it was error to consider [defendant's] violation of community control as an aggravating factor in sentencing."

Accordingly, at the time of Sims' sentencing, Carter would have had a strong argument that controlled release did not qualify as a "sentence of

imprisonment" adequate to support the aggravating factor. Yet Carter made no such argument against this, or any, of the State's aggravators. Had Carter contested this aggravator, it is possible that the Court would have removed one of the statutory aggravators from consideration by the jury. Given this potentially enormous benefit to Mr. Sims, and the lack of any discernible downside, Carter's failure to object fell below the range of professionally competent assistance.

4. Carter Failed to Ensure the Jury was Properly Instructed on Mr. Sims' Eligibility for Parole.

As this Court has recognized, "a juror's understanding of a life without parole sentencing option can make a crucial difference in whether the juror votes for life or death." *Perry v. State*, 801 So.2d 78, 83 (Fla. 2001). Accordingly, in *Simmons v. South Carolina*, 512 U.S. 154 (1994), the U.S. Supreme Court held that merely telling the jury that the alternative to death is "life imprisonment" is insufficient because "public opinion and juror surveys support the commonsense understanding that there is a reasonable likelihood of juror confusion about the meaning of the term 'life imprisonment.'" *Id*. at 169-70 n.9. For this reason, the Court concluded that a death sentence must be overturned where "[t]he jury reasonably may have believed that petitioner could be released on parole if he were not executed." *Id.* at 161-62.

Despite the critical importance of accurately instructing the jury of its sentencing options, Carter failed to take reasonable steps to correct the cloud of

confusion in this case obscuring whether Mr. Sims would be eligible for parole if the jury sentenced him to life imprisonment. On two separate occasions, the court informed the jury that, if sentenced to a term of imprisonment, Mr. Sims still would be eligible for parole after 25 years. (T. 394 (court informed prospective jurors that choice would be the electric chair or "life without possibility of parole *for 25 years*") (emphasis added)); (T. 1471 (guilt-phase jury instruction that "penalty for first-degree murder of a law enforcement officer is death by electrocution or life imprisonment without the possibility of parole *for 25 years*") (emphasis added)). At the guilt/innocence phase, Pitts compounded this error by again telling the jury that the alternative to "electrocution" for Mr. Sims was to "go to prison for life *with a minimum of 25 years*" (T. 1444) (emphasis added).

During the sentencing phase, the State recognized the uncorrected error in the guilt-phase instructions and informed the court. (T.1567-68). Nevertheless, in its instructions to the jury at the start of the sentencing phase, the court *again* incorrectly instructed the jury, stating that "the punishment for this crime is either death or life imprisonment." (T. 1570). The proper instruction at the time would have been "the punishment for this crime is either death or life imprisonment *without eligibility for release*." *See Standard Jury Instructions -- Criminal Cases*, No. 92-1 (Supreme Court of Florida) (emphasis added), reprinted at 603 So.2d 1175, 1178. Thus, after having been repeatedly told that Mr. Sims

would be eligible for parole, the jury once again was misinformed about their possible sentencing options.

During closing argument, Carter made some attempt to address the confusion caused by the court and Mr. Pitts. Carter told the jury that "when you found [Mr. Sims] guilty of killing a law enforcement officer, it doesn't mean life in prison with the possibility for parole in 25 years, it means life in prison with no parole ever." (T. 1584-85). In addition, in its closing instructions, the court stated if the jury selected a life sentence, its advisory sentence would contain the phrase "without the possibility of parole." (T. 1599).

Despite these attempts at eliminating juror confusion, it appears that the advisory verdict form actually given to the jury stated – once again, incorrectly – that if sentenced to a term of imprisonment, Mr. Sims would have the "possibility of parole [after] 25 years." (ROA Dir. 539). Although the Court stated outside the presence of the jury that it had taken some "white-out" fluid and "erase[d] the 25-year portion" (T. 1599), no such "altered" jury verdict form exists in the record of this case. The advisory verdict form in the ROA of Mr. Sims' direct appeal reflects an unredacted verdict form jury form, and the Circuit Court's files also only contain the jury verdict form indicating that Mr. Sims would be eligible for parole after 25 years. (ROA Dir. 539). This Court is bound to rely on the record as it actually exists, not as guesswork and speculation might have it.

E.g. Rhines v. Ploof Transfer Co., Inc., 313 So.2d 791, 792 (Fl. Dist. Ct. App. 1975) (absent supplementation of record, court is "bound by the record-on-appeal transmitted to us"). Thus, this Court should presume that the final instruction that the jury received, and which they had before them while in the jury room, once again contained the information that Mr. Sims would be eligible for parole.

Even examining the situation above in the most favorable light to the State, the most that can be said is that, as in *Simmons*, "the jury was left to speculate about [the defendant's] parole eligibility." 512 U.S. at 165. Prevailing professional norms required Carter to rectify this situation by insisting on the record that the court issue an appropriately explicit instruction clarifying the sentencing options. (ROA 1341 (Potolsky)). Under the circumstances, it was plainly insufficient for Carter to try to correct the situation himself – as an advocate compromised by the prosecution's attacks – by simply telling the jury his belief as to the governing law. (ROA 1341 (Potolsky)). Carter failed to take reasonable steps that any competent lawyer would have been expected to take..

The lower court's Order in this case held that the issue of "the author of the sentencing order" "has no evidence to support it and will not considered by the Court." (ROA 926). But that assertion is flatly contradicted by the face of the document itself. (ROA Dir. 51). As with the rest of the Order, the court's conclusory assertions do not form the basis for a true factual finding and warrant

no deference from this Court; and at a minimum, Mr. Sims was entitled to a hearing to establish other pertinent facts. Based on the Sentencing Memorandum alone, however, this court should hold that the sentence must be overturned.

5. Carter's Deficient Preparation for and Performance During the Penalty Phase Overwhelmingly Prejudiced Mr. Sims.

Carter's woefully deficient preparation and performance during the penalty phase unquestionably had a prejudicial effect on the outcome of this case. *See, e.g.*, *State v. Lewis* 838 So.2d 1102 (Fla. 2002) (vacating sentence due to counsel's failure to adequately investigate); *Stevens*, 552 So.2d at 1087 (vacating sentence due to counsel's failure to investigate, failure to present mitigation evidence, and failure to vigorously argue on behalf of defendant). By failing to investigate and present testimony regarding Mr. Sims' work history and educational record, the jury was deprived of valuable evidence demonstrating that Mr. Sims had the capacity to be rehabilitated and productive while incarcerated. Moreover, this testimony would have provided a critical rebuttal to the prosecution's attempts to paint Mr. Sims as a drug dealer and criminal on parole. *Id.* at 1086 (granting new penalty phase trial due in part to counsel's failure to present evidence of defendant's "[e]mployment history and positive character traits … since these factors may show potential for rehabilitation and productivity within the prison system."); *see also Holsworth v. State*, 522 So.2d 348, 354 (Fla. 1988); *Fead v. State*, 512 So.2d 176 (Fla. 1987).

Even with the witnesses that Carter did put on the stand, Carter's lack of preparation resulted in unfocused and often affirmatively harmful testimony that likely impacted the jury's recommendation. *See State v. Lara*, 581 So.2d 1288, 1289 (Fla. 1991) (granting new penalty phase based in part on deficient witness examinations); *State v. Coney*, 845 So.2d 120, 130-31 (Fla. 2003) (new sentencing phase warranted because mitigation evidence consisted of "only hastily obtained, fragmented testimony" that "supplied no evidence of mitigating circumstances"); *Collier v. Turpin*, 177 F.3d 1184, 1201-02 (11th Cir. 1999) ("Counsel presented no more than a hollow shell of the testimony necessary for 'a particularized consideration of relevant aspects of the [defendant's character and record ....").

Compounding these failures, Carter inexcusably failed to object to any of the State's proposed aggravating factors, including factors that were subject to challenge at the time. Moreover, Carter failed to ensure that the jury was properly instructed on the key issue that the jury was asked to consider – the proper penalty to apply to Mr. Sims. As this court has stated, "a juror's understanding of a life without parole sentencing option can make a crucial difference in whether the juror votes for life or death." *Perry v. State*, 801 So.2d 78, 81 (Fla. 2001). Accordingly, had Carter competently ensured that the jury was accurately instructed, "there is a reasonable probability that … the result of the proceeding would have been different." *Ragsdale*, 798 So.2d at 715 (quoting *Strickland*, 466 U.S. at 694).

As Carter himself admitted during the post-conviction evidentiary hearing, none of these failures can be justified as a strategic or informed choice. (ROA 1177, 1210) As the court observed in *Stevens*, an informed decision cannot be made when "trial counsel was unaware the evidence existed." *Stevens*, 552 So.2d at 1087. Here, too, Carter's near-abandonment of his client cannot be described as the result of a reasoned professional judgment. Especially given that only two jurors needed to be convinced that Mr. Sims deserved a life sentence, there is a substantial likelihood that Carter's failures affected the outcome. *See Garcia v. State*, 622 So.2d 1325, 1329 (Fla. 1993); *Riechmann*, 777 So.2d at 350. Under such circumstances, Carter's deficient presentation prejudiced Mr. Sims.

C. Carter Abdicated His Responsibilities as Mr. Sim's Advocate After the Jury Narrowly Recommended a Death Sentence.

After the jury returned its recommendation, Carter had five weeks to prepare additional evidence and argument for presentation at the *Spencer* hearing. Even the court and the State acknowledged Mr. Sims' right to make such a presentation and their expectation that Carter would do so. (T. 1604-05). Instead, Carter essentially did nothing, submitting an "inexcusab[y]" deficient sentencing memorandum and presenting no additional witnesses at the *Spencer* hearing. (ROA 1344 (Potolsky)). Carter's abject performance fell far below the standards of the Florida capital defense bar and further prejudiced Mr. Sims.

1. Carter Submitted a Facially Deficient Sentencing Memorandum.

Carter submitted a sentencing memorandum that Potolsky called "about the most poorly drafted and unconvincing pleading that I have ever seen in a capital case." (ROA 1344). The two-and-a-half page memo is replete with typographical and grammatical errors; contains numerous nonsensical sentences; and cites no specific record evidence to support any of its bare assertions. Although the document states that "[t]he death of the defendant's father devastated the defendant" and that "there is no evidence showing that the homocide [*sic*] was anything but the results [*sic*] of a fear in the mind of the defendant" (ROA Dir. 544-45), Carter's failure to hire a mental health expert deprived him of critical evidence to support these contentions. Similarly, as shown above, Carter totally failed to discover or present abundant available evidence to support his conclusory assertion that Mr. Sims had a positive work history. Instead, the memorandum merely states: "[T]he defendant worked while in High School." (ROA Dir. 544-45). Given Carter's failure to cite any evidence in support of his asserted mitigating factors, it is hardly surprising that the Court "[found] little to no weight to each of them." (ROA Dir. 555).

2. Carter Failed to Make Any Substantive Presentation to the Court at the *Spencer* Hearing.

Compounding the deficient sentencing memorandum, Carter essentially did nothing at all at the *Spencer* hearing. With his client's life on the line, and given one final opportunity to persuade the Court not to adopt the jury's

8-to-4 death recommendation, Carter merely observed to the trial court that Mr. Sims was 24 years old, not 25, at the time of the offense. (T. 1609).

Carter offered no reasonable strategic explanation for failing to present any evidence or argument at the *Spencer* hearing, and no legitimate rationale can be inferred from the record. As Potolsky testified, "[i]n the wake of an eight to four jury recommendation for death, unless something is done at the *Spencer* hearing, your client is going to die." (ROA 1344). Yet Carter, once again, did nothing at all. In past cases, this Court has stressed the importance of the *Spencer* hearing and, under circumstances less egregious than here, it has granted capital defendants new sentencing trials based on the failure of counsel to advocate on the defendant's behalf. *See, e.g., Stevens*, 552 So.2d at 1087 (counsel's inaction after jury death recommendation "amounted to a substantial and serious deficiency measurably below the standard for competent counsel"). It should do the same here.

3. Carter Failed to Object When the Court Apparently Adopted the State's Sentencing Memorandum.

It is well established that the sentencing court may not "rubber stamp" the State's proposed sentencing recommendation. *Robinson v. State*, 684 So.2d 175, 177 (Fla. 1996); *see also Reese v. State*, 728 So.2d 727, 730 (Fla. 1999) (Pariente, J., concurring). Here, Carter failed to object when the court essentially adopted the State's "Sentencing Memorandum." The document signed by Judge

Carney appears to have been filed by the State several days prior to Mr. Sims' sentencing. (ROA Dir. 551). Notations on the document suggest that the court simply took the State's Memorandum, filled in the blank left in the document by the State, and altered the date. (ROA Dir. 551 (hand-corrected filing date)). Because Judge Carney refused to grant an evidentiary hearing on this issue, which was timely raised in Mr. Sims' Amended Rule 3.850 Motion, Mr. Sims has not been able to develop the factual record as to whether the court adopted the State's sentencing memorandum. While Mr. Sims submits that a new penalty phase trial is required based on the current factual record, this Court in the alternative should remand the case for additional proceedings on this issue.

4. Carter's Failure to Defend Mr. Sims Following the Jury Recommendation Prejudiced Mr. Sims.

Based on this record, it appears that after the jury recommended a death sentence, Carter essentially gave up on his client. He raised no objection when the court improperly issued its death sentence only 65 minutes after the end of the *Spencer* hearing. (*See* ROA 303 (legal error not to adjourn)). By submitting a sentencing memorandum that was inexcusable, waiving his right to argue for his client at the *Spencer* hearing, and then turning a blind eye when the court adopted the State's sentencing memorandum, Carter all but abandoned his client. Particularly given the narrow margin of the jury's recommendation, Carter's deficient performance undoubtedly prejudiced the outcome. *E.g.*, *Stevens*, 552

So.2d 1087 (new penalty phase granted because "[t]rial counsel essentially abandoned the representation of his client during sentencing").

D. The Cumulative Impact of Carter's Failures Constituted Ineffective Assistance and Prejudiced Mr. Sims.

This Court has held that a reviewing court must assess the cumulative impact of an attorney's deficient performance, since prejudice may result from multiple failures that individually do not rise to the level of ineffective assistance. *See, e.g.*, *Hildwin v. Dugger*, 654 So.2d 107, 110 (Fla. 1995). While each of the failures of Arthur Carter standing alone is sufficient to require a new penalty phase hearing, when viewed cumulatively, the ineffectiveness and prejudicial impact of Carter's ineffective assistance is inescapable. With no strategic rationale whatsoever, Carter forsook numerous avenues of potential mitigation evidence that, as the Rule 3.850 hearing demonstrated, would have given the jury a far more mitigated view of Mr. Sims' actions. Moreover, the testimony of the witnesses presented at the Rule 3.850 must be viewed in conjunction with the far more substantive and persuasive testimony that Carter – with a bare modicum of preparation – undoubtedly could have elicited from the witnesses whom he did call. Had Carter bestirred himself to advocate for Mr. Sims at any stage and to correct the numerous other defects of the penalty phase that went unaddressed, the outcome of Mr. Sims penalty phase might well have been different. The integrity

of the judicial process and the Florida capital sentencing system demands that Mr. Sims' be granted a new penalty phase trial.

IV. THE CIRCUIT COURT ERRED IN EXCLUDING THE TESTIMONY OF MR. SIMS' EXPERT ON INEFFECTIVE ASSISTANCE OF COUNSEL.

In its Order denying Mr. Sims' Amended 3.850 Motion, the Circuit Court also erred by ruling that the expert testimony of Steven Potolsky was inadmissible. When evaluating claims of ineffective assistance, courts are asked to compare the conduct of the defense attorney against prevailing standards of professional conduct. Therefore, Florida courts, including this Court, regularly rely on and cite the testimony of experts experienced in representing capital defendants. *E.g.*, *King v. State*, 407 So.2d 904, 905 (Fla. 1981); *Daugherty v. State*, 505 So.2d 1323, 1324 (Fla. 1987). In fact, in *State v. Reichmann*, 777 So.2d 342, 349 (Fla. 2000), this Court itself favorably cited the testimony of Mr. Potolsky himself as an expert on the prevailing professional standards to which capital defense counsel must be held. Accordingly, there was no basis for the lower court's blanket conclusion that Potolsky was opining only on issues of law, nor for the court's exclusion of Mr. Potolsky's expert testimony. [26]

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[26] The Circuit Court's Order cites *Freund v. Butterworth*, 165 F.3d 839 (11th Cir. 1999), in support of its ruling. As noted above, however, *Freund* concerned the reasonableness of defense counsel's trial strategy, which was not the focus of Potolsky's testimony. Nor did *Provenzano v. Singeltary*, 148 F.3d 1327, 1332 (continued…)

Even without Mr. Potolsky's testimony, however, Mr. Sims has overwhelmingly established that Carter's assistance was constitutionally ineffective. In the absence of expert testimony on this issue, this Court would have to apply its own understanding of prevailing professional norms that govern the performance of defense counsel. (Certainly, the lower court made no factual findings on that issue.) No rational standard could possibly bless the glaring deficiencies of Carter's performance at the penalty phase.

V. MR. SIMS' SENTENCE IS UNCONSTITUTIONAL UNDER *RING V. ARIZONA*.

The U.S. Supreme Court has held that the Sixth and Fourteenth Amendments of the federal Constitution require a jury, rather than a judge, to find the aggravating factors necessary to impose a death sentence. *Ring v. Arizona*, 536 U.S. 584 (2002). Florida's capital sentencing system is unconstitutional because the trial judge, not the advisory jury, makes the findings of fact required to impose a death sentence. Mr. Sims' sentencing under this system deprived him of his constitutional right to have each factual element necessary for a death sentence

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(11th Cir. 1998) – the only other case cited in the Order – hold that expert testimony regarding ineffective assistance is never appropriate. Even if these procedural decisions of federal courts were controlling on this Court – which they are not – Potolsky's expert testimony concerning prevailing professional norms among capital defense counsel still would be a valid subject for such testimony under Fed. R. Evid 702.

found by a jury beyond a reasonable doubt. *Id.* Although this Court has previously rejected challenges to Florida's capital sentencing system, *e.g*, *Windom v. State*, 886 So.2d 915 (Fla. 2004), Mr. Sims respectfully requests that the Court reconsider these holdings and declare Mr. Sims' sentence unconstitutional.

CONCLUSION

The guarantees embodied by the Sixth Amendment to U.S. Constitution and Article I, Section 16, of the Florida Constitution demand that criminal defendants be provided with effective assistance to competent counsel. Nowhere is this fundamental principle more important than in a capital murder trial. Despite this fact, Mr. Sims' trial was fraught with inexcusable failures by his counsel that dramatically and adversely influenced the probable outcome of both phases of his trial. Accordingly, Mr. Sims respectfully requests that this Court vacate his sentence and underlying convictions and order a new trial.

Respectfully submitted,

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August 31, 2005

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CERTIFICATE OF SERVICE

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief is written in Times New Roman 14-point font in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

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