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.

REPLY BRIEF OF APPELLANT

P. Benjamin Duke
Scott D. Danzis
admitted *pro hac vice*
COVINGTON & BURLING
1330 Avenue of the Americas
New York, NY 10019
Telephone: (212) 841-1000
Facsimile: (212) 841-1010

Benjamin S. Waxman
ROBBINS, TUNKEY, ROSS, AMSEL, RABEN, WAXMAN & EIGLARSH, P.A.
2250 Southwest Third Avenue, 4th Floor
Miami, FL 33129
Telephone: (305) 858-9550
Facsimile: (305) 858-7491

Attorneys for Appellant Merrit Alonzo Sims

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

INTRODUCTION 1

ARGUMENT 1

I. MR. SIMS' COUNSEL FAILED TO OBJECT TO HIGHLY PREJUDICIAL EVIDENCE AND REMARKS DURING THE GUILT PHASE OF THE TRIAL. 1

A. The Failure of Mr. Sims' Counsel to Challenge the Prosecution's Unreliable Dog-Alert Evidence Was Inexcusable and Severely Prejudiced Mr. Sims' Defense at Trial. 1

B. Trial Counsel's Failure to Object to the Crime-Scene Evidence Constituted Ineffective Assistance and Prejudiced Mr. Sims. 6

C. Mr. Sims' Counsel Failed to Challenge Obviously Objectionable Comments by the Prosecutor. 7

II. MR. SIMS' COUNSEL FAILED TO MAKE A MINIMALLY COMPETENT INVESTIGATION AND PRESENTATION DURING THE PENALTY PHASE. 10

A. Carter's Failure to Obtain a Mental Health Evaluation of Mr. Sims Constituted Ineffective Assistance of Counsel. 10

1. Carter's Second-Hand "Investigation" Was Inadequate and Did Not Support a Reasonable Choice to Forgo Mental Health Mitigation Evidence. 12

2. Even the Preliminary Materials Prepared by Geller Should Have Prompted Carter to Pursue Mental Health Mitigation Evidence. 16

3. No Strategic Rationale Existed for Carter's Failure to Present Mental Health Evidence. 19

B. Carter's Deficient Investigation Deprived Mr. Sims of Critical Fact Witnesses. 23

C. Carter Failed to Ensure the Jury Was Properly Instructed on Mr. Sims' Parole Eligibility. 26

D. Carter Did Essentially Nothing to Defend Mr. Sims Following the Jury's Recommendation. 28

E. Mr. Sims Has Overwhelmingly Established Prejudice. 29

III. CARTER HAD A CONFLICT OF INTEREST THAT COMPROMISED HIS REPRESENTATION OF MR. SIMS. 30

IV. THE TESTIMONY OF MR. POTOLSKY SHOULD BE CONSIDERED BY THIS COURT..... 33

CONCLUSION 34

CERTIFICATE OF SERVICE..... 35

CERTIFICATE OF COMPLIANCE. 36

TABLE OF AUTHORITIES

FEDERAL CASES

Baldwin v. Johnson, 152 F.3d 1304 (11th Cir. 1998) 22

Cuyler v. Sullivan, 446 U.S. 335 (1980)..... 30-31

Elledge v. Dugger, 823 F.2d 1439 (11th Cir. 1987)..... 20

Goodwin v. Balkcom, 684 F.2d 994 (11th Cir. 1982) 19

Hardwick v. Crosby, 320 F.3d 1147 (11th Cir. 2003) 19

Herring v. Sec'y, Department of Corrections, 397 F.3d 1338 (11th Cir. 2005) 31

Mickens v. Taylor, 535 U.S. 162 (2002)..... 31

Porter v. Singletary, 14 F.3d 554 (11th Cir. 1994)..... 16

Wiggins v. Smith, 539 U.S. 510 (2003) 16

Williams v. Head, 185 F.3d 1223 (11th Cir. 1999)..... 21

STATE CASES

Bruno v. State, 807 So. 2d 55 (Fla. 2002).....2, 27

Chacon v. State, 735 So. 2d 569 (Fla. 2d DCA 1999) 11

Cooper v. Dugger, 526 So. 2d 900 (Fla. 1988) 25

Correll v. Dugger, 558 So. 2d 422 (Fla. 1990) 21-22

Elledge v. State, 911 So. 2d 57 (Fla. 2005)..... 31

Eure v. State, 764 So. 2d 798 (Fla. 2d DCA 1998) 9

Garcia v. State, 622 So. 2d 1325 (Fla. 1993)..... 30

Garron v. State, 528 So. 2d 353 (Fla. 1988)..... 4, 9

Gore v. State, 784 So. 2d 418 (Fla. 2001) 32

Henderson v. Singletary, 617 So. 2d 313 (Fla. 1993)..... 33

Hildwin v. Dugger, 654 So. 2d 107 (Fla. 1995).....9, 29

Huff v. State, 762 So. 2d 476 (Fla. 2000) 11

Jackson v. State, 711 So. 2d 1371 (Fla. 4th DCA 1998)..... 3

Johnson v. State, 888 So. 2d 122 (Fla. 4th DCA 2004)..... 3

Melendez v. State, 612 So. 2d 1366 (Fla. 1992)..... 22

Pope v. State, 569 So. 2d 1241 (Fla. 1990)..... 3

Ragsdale v. State, 720 So. 2d 203 (Fla. 1998) 22

Ragsdale v. State, 798 So. 2d 713 (Fla. 2001) ..... *passim*

Redish v. State, 525 So. 2d 928 (Fla. 1st DCA 1988)..... 8

Rhines v. Ploff Transfer Co., Inc., 313 So. 2d 791 (Fla. 1st DCA 1975) 27

Rose v. State, 675 So. 2d 567 (Fla. 1996)..... 16

Ross v. State, 726 So. 2d 317 (Fla. 2d DCA 1998)..... 3, 8

Rutherford v. Moore, 774 So. 2d 637 (Fla. 2000) 2

Sims v. State, 681 So. 2d 1112 (Fla. 1996) 2, 4, 7

Socor v. State, 883 So. 2d 766 (Fla. 2004) 25

State v. Coney, 845 So. 2d 120 (Fla. 2003)..... 25

State v. Lara, 581 So. 2d 1288 (1991)..... 25

State v. Reichmann, 777 So. 2d 342 (Fla. 2000) 32-33

Stewart v. State, 420 So. 2d 862 (Fla. 1982)..... 2

Stevens v. State, 552 So. 2d 1082 (Fla. 1989) 26

INTRODUCTION

This Court has repeatedly recognized that the constitutional right of capital defendants to receive competent and zealous representation of counsel will be meaningful only if the standard of "ineffective assistance" has genuine content. In order to defend the performance of Mr. Sims' counsel in the present case, however, the State's Opposition Brief offers a catalogue of convenient excuses and rationalizations that, if upheld by this Court, would undermine the basic protections that the right to effective assistance of counsel was intended to preserve. To avoid such a result, Mr. Sims' conviction and sentence should be vacated in their entirety and the case should be remanded to the lower court for a new trial.

ARGUMENT

I. MR. SIMS' COUNSEL FAILED TO OBJECT TO HIGHLY PREJUDICIAL EVIDENCE AND REMARKS DURING THE GUILT PHASE OF THE TRIAL.

A. The Failure of Mr. Sims' Counsel to Challenge the Prosecution's Unreliable Dog-Alert Evidence Was Inexcusable and Severely Prejudiced Mr. Sims' Defense at Trial.

The State tries to throw up legal barriers to Mr. Sims' ineffective-assistance claim arising from his counsel's failure to object to the prosecution's dog-alert evidence, and then muddies the record in an effort to obscure the

prejudice that Mr. Sims suffered as a result. None of the State's arguments has merit.

First, there is no legal basis for the State's contention that Mr. Sims' claim improperly attempts to "circumvent the rule that post-conviction proceedings cannot serve as a second appeal," Opp. Br. at 24. It is beyond dispute that Mr. Sims' trial counsel failed to preserve this issue for direct appeal by failing to raise any contemporaneous objection to the evidence. *See Sims v. State*, 681 So.2d 1112, 1115 (Fla. 1996) (stating that Mr. Sims' counsel "neither objected to the admissibility of the testimony regarding the dog-alert nor did he seek to strike that testimony when it became apparent that the trial court was going to permit the state to use [the parole officer's] testimony to prove Sims was on parole and that he knew drug possession was a parole violation."). Based on that failure by his counsel, Mr. Sims raises here an ineffective assistance claim which, as this Court has expressly held, "can be raised in a rule 3.850 motion but not on direct appeal." *Bruno v. State*, 807 So.2d 55, 63 (Fla. 2002); *Stewart v. State*, 420 So.2d 862, 864 n. 4 (Fla. 1982).[1] This claim was properly raised in Mr. Sims' Rule 3.850 motion below and should be reviewed on the merits here.

---

[1] In *Rutherford v. Moore*, 774 So.2d 637 (Fla. 2000), this Court indicated that, in "rare exceptions," ineffective assistance may be heard on direct appeal – but even then, raising such a claim on direct appeal was not required. *Id.* at 648.

Nor is there any foundation for the State's unsupported assertion that Mr. Sims has not sufficiently alleged prejudice arising from trial counsel's failure to object, *see* Opp. Br. at 35. Counsel's unreasonable failure to object and thereby preserve an issue for appellate review plainly can constitute ineffective assistance. *See Johnson v. State*, 888 So.2d 122, 125 (Fla. 4th DCA 2004) ("Failure to properly preserve an issue for appellate review may constitute ineffective assistance of counsel."); *accord Jackson v. State*, 711 So.2d 1371, 1372 (Fla. 4th DCA 1998). *Pope v. State*, 569 So.2d 1241 (Fla. 1990), is not to the contrary. Here, Mr. Sims contends that he suffered prejudice as a result of counsel's failure to object because had counsel objected the admission of the State's speculative, highly prejudicial dog-alert evidence as direct proof of Mr. Sims' guilt would have been subject to reversal. Consequently, Mr. Sims' right to a fair trial was actually compromised by counsel's inaction. *See Pope*, 569 So.2d at 1245; *see also Ross v. State*, 726 So.2d 317, 319 (Fla. 2d DCA 1998) (finding ineffective assistance where reversal would have resulted had an objection been raised).

Equally unfounded is the State's suggestion that Mr. Sims' counsel actually did object to this evidence or that counsel's failure was somehow excusable because the trial court had already "made its feelings clear on the matter" in deciding an earlier pretrial motion *in limine* on a different issue. *See* Opp. Br. at 30; 32. Neither of the colloquies quoted in the State's brief occurred at

the time that the dog-alert evidence was actually introduced,[2] and the court's dicta from the bench did not absolve counsel of the duty to lodge a contemporaneous objection. This Court itself concluded, on direct appeal, that "*[w]ithout objection from Sims*, the state adduced evidence that a police dog alerted to presence of drugs in the car." 681 So.2d at 1115 n.5 (emphasis added). There is no basis for the State's attempt to obscure the unambiguous record on this point.

The State also seeks to minimize the importance of the dog-alert evidence on the grounds that it was merely introduced to "establish motive, which is not an element of the crime." Opp. Brief at 34. As this Court has previously held, however, evidence introduced to establish motive can be so unfairly prejudicial as to deprive a defendant of a fair trial. *See, e.g.*, *Garron v. State*, 528 So.2d 353, 358 (Fla. 1988) (per curiam). Moreover, the State does not, and cannot, dispute the crucial role that the dog-alert evidence played in the prosecution's case at trial. Indeed, most elements of the alleged crimes, including the fact that Mr. Sims shot and killed Officer Stafford, were not disputed. The only real question was Mr. Sims mental state – *i.e.*, "Why?" Without the dog-alert evidence, the

---

[2] Moreover, Mr. Sims' counsel did not expressly raise an objection to the admission of the dog-alert evidence in either of these colloquies. The issue first came up in the course of discussing *the prosecution's* motion to exclude certain evidence, and later was mentioned in the context of a discussion about the testimony of Mr. Sims' parole officer. T. 383-86, 1103-04. There can be no serious question that Mr. Sims' counsel never directly challenged this evidence.

highly prejudicial testimony of the parole officer could not have been allowed. *See* Initial Br. at 53. And without the ability to stigmatize Mr. Sims with the "fearful drug dealer" label, the State had no plausible explanation for why Mr. Sims killed Officer Stafford, other than to defend himself. As the prosecution's repeated references in closing argument starkly reflected, this speculative motive theory was the centerpiece of the prosecution's case. *See id*. at 53-55.

Finally, this Court should reject the State's suggestion that the standard for admitting the dog-alert evidence to prove motive should be more lax than the standard applied in determinations of probable cause, *see* Opp. Br. at 28. To the contrary, the prosecution logically should be held to a higher, more rigorous standard of reliability when such evidence is offered for this purpose. In the normal context, the reliability of a dog-alert is necessary only to justify a search for concrete evidence of illegal drugs. Here, the absence of any actual fruit from the search of Mustipher's car was undisputed, and the only evidence offered by the State was the evidence of the dog-alert itself. In this context, the prejudicial impact of this evidence at Mr. Sims' trial went far beyond that which arises from a mere probable-cause determination. That Mr. Sims' counsel had an opportunity to cross-examine Officer Silva was not, as the State suggests, a sufficient corrective

for this prejudice. Given the absence of sufficient indicia of reliability[3] and the degree to which the prejudicial impact of this evidence outweighed its minimal probative value, the evidence should have been excluded as a matter of law. Had Mr. Sims' counsel raised an appropriate objection, either the evidence would not have been admitted or Mr. Sims' right to a fair trial could have been vindicated on direct appeal.

B. Trial Counsel's Failure to Object to the Crime-Scene Evidence Constituted Ineffective Assistance and Prejudiced Mr. Sims.

In a similar vein, Mr. Sims' counsel did little to challenge the prosecution's crime scene arguments. Given the critical importance of the forensic evidence to support Mr. Sims' self-defense claims, reasonably competent counsel would have mounted a vigorous challenge to the prosecution's presentation, including by retaining a crime scene expert. Although the State alleges that Mr. Sims "failed to specifically allege what a reconstruction expert would have testified to in this regard," Opp. Br. at 36, the trial court summarily rejected this claim, and Mr. Sims therefore has never been provided with an evidentiary hearing to develop this argument. If Mr. Sims were given a chance to develop this

[3] Mr. Sims submits that this Court should vacate his conviction without remanding to the lower court for an evidentiary hearing. Were an evidentiary hearing granted, however, Mr. Sims would introduce expert and other testimony to demonstrate that (1) the testimony of Officer Silva was fundamentally insufficient to prove the dog-alert's reliability, and (2) the State's record-keeping was so fundamentally inadequate as to prevent it from making a sufficient showing in that regard.

argument, he could demonstrate that a competent crime-scene presentation by defense counsel would have dramatically altered the complexion of the evidence against Mr. Sims, resulting in a reasonable probability that the outcome of his trial would have been different.

C. Mr. Sims' Counsel Failed to Challenge Obviously Objectionable Comments by the Prosecutor.

There is no merit to the State's contention that Mr. Sims' claim based on the prosecutor's improper summation remarks should be rejected because the statements at issue were raised in Mr. Sims' direct appeal to this court. *See* Opp. Br. at 39. The State fails to mention that this Court did not reach the merits of Mr. Sims' claim on direct appeal "because defense counsel failed to object contemporaneously to any of the comments at issue." *Sims*, 681 So. 2d at 1116-17. Therefore, this is not a situation in which this Court previously considered the merits of this issue, and the gross negligence of counsel in failing to preserve this issue provided ample basis for Mr. Sims' ineffective-assistance claim on his Rule 3.850 motion.

The State concedes that references by a prosecutor to matters outside the record of a case, are "generally improper." Opp. Br. at 43. Indeed, given that the prosecutor in this case expressly called upon his "12 years" of service as a prosecutor and announced that he was "real tired" of hearing that "every officer says 'I am going to kill you,'" even the State appears to find these remarks to be

indefensible. (T. 1428). The State also concedes that the prosecutor "misstated" the testimony of a witness in his closing argument in attempt to attack the integrity of Mr. Sims' counsel. Opp. Br. at 44. Nevertheless, the State defends other remarks made by the prosecutor as "proper" or "fair comment[s]," including suggestions that Mr. Sims' testimony was scripted by his attorneys, statements that Mr. Sims' attorneys "want to mislead [the jury]," and attempts to bolster his own credibility by reference to his status as prosecutor. (T. 1437, 1441). These were not "fair comments," but were baseless attempts to undermine Mr. Sims' and his lawyers' credibility and to bolster his own. *Garron v. State*, 528 So.2d 353, 358 (Fla. 1988) (per curiam); *Redish v. State*, 525 So.2d 928, 931 (Fla. 1st DCA 1988). A reasonably competent attorney would have raised an objection both to prevent the jury from hearing the remarks and to preserve the issue for appeal. *Ross v. State*, 726 So.2d 317, 319 (Fla. 2d DCA 1998).

The State also urges this Court to speculate that, had Mr. Sims' counsel been competent and objected to these comments, the result would have been nothing more than a curative instruction. Opp. Br. at 45. In *Garron*, however, this Court ordered a new penalty phase, even though the defendant's counsel objected to many of the comments at issue and despite several curative instructions given by the trial court. *Id*. Moreover, had satisfactory curative instructions been given here, there is a reasonable probability that they would have

affected the outcome of the trial. *See Eure v. State*, 764 So.2d 798, 801 (Fla. 2d DCA 1998). Particularly when the improper remarks are considered together, the prejudice to Mr. Sims is obvious. *Garron*, 528 So.2d at 358 (holding that a prosecutor's improper "remarks, *when taken in their totality*, justify a new penalty proceeding" (emphasis added)).

While attacking Mr. Sims' individual arguments, the State's Brief fails to acknowledge that the *cumulative impact* of an attorney's deficient performance may warrant vacatur even where each of counsel's multiple failures individually do not rise to the level of ineffective assistance. *See, e.g.*, *Hildwin v. Dugger*, 654 So.2d 107, 110 (Fla. 1995). Here, the combined impact of counsel's many failures raises grave doubt about the integrity of the guilt-phase trial of Mr. Sims. By allowing the prosecution to unfairly tarnish Mr. Sims with its unreliable, speculative dog-sniff theory, rolling over in the face of the State's crime-scene expert, and raising no objection to the prosecutor's improper summation remarks, Mr. Sims' counsel irresponsibly opened the door to massive unfair prejudice. Absent these omissions, there is a strong likelihood that the trial would have had a different outcome.

II. MR. SIMS' COUNSEL FAILED TO MAKE A MINIMALLY COMPETENT INVESTIGATION AND PRESENTATION DURING THE PENALTY PHASE.

The State does not – and cannot – dispute that Arthur Carter's entire penalty-phase preparation consisted of reviewing a preliminary report prepared for $1000 by an outside investigator and scheduling a handful of witnesses to testify, perfunctorily and without preparation, at Mr. Sims' penalty phase hearing. Nor does the State take issue with the well-established principle, cited in Mr. Sims' Initial Brief, that counsel's duty of reasonable investigation is significantly heightened in capital cases. *See* Initial Br. at 70. Turning a blind eye to the reality reflected in the record, however, the State goes so far as to champion Mr. Carter's performance, contending that "Mr. Carter clearly made *all reasonable efforts* to seek mitigation evidence" on behalf of Mr. Sims. *See* Opp. Br. at 64. This Court should reject the State's unreasonably rosy view of Carter's penalty-phase performance, and grant Mr. Sims a new sentencing hearing.

A. Carter's Failure to Obtain a Mental Health Evaluation of Mr. Sims Constituted Ineffective Assistance of Counsel.

The State's Opposition Brief does not deny that the detailed neuropsychological evaluation and testing conducted by Dr. Charles Golden, who testified extensively at the Rule 3.850 hearing, yielded significant mental-health mitigation evidence that would have supported Mr. Sims' bid for life at his penalty-phase hearing. Nor does the State dispute the fact that, had Carter pursued

such evaluation and testing, Mr. Sims would have been able to present expert testimony establishing the existence of two key statutory mitigating factors under Florida law – namely, that Mr. Sims (i) "was under extreme emotional disturbance at [the] time [of the crime]" and (ii) "did not appreciate the criminality of what he was doing at the time that he was doing it." (ROA 1062-63 (Golden)). Instead, the State focuses exclusively on attempting to defend the lower court's bare assertion (without any discussion of the factual record) that "'[n]o where [*sic*] in this record is there any suggestion calling for mental evaluation.'" Opp. Br. at 57.[4] This conclusory finding by the lower court has no foundation and therefore cannot be sustained.

---

[4] There is no merit to the State's suggestion that all of Mr. Sims' penalty-phase claims should have been dismissed as "untimely" because they were asserted for the first time in Mr. Sims' Amended Motion under Rule 3.850. Opp. Br. at 56. As the State admits, even the lower court did not find the three issues addressed at the evidentiary hearing to be untimely, and the court ruled on those issues solely on the merits. *See id.* (acknowledging that lower court's rulings on timeliness were limited to "the claims regarding the failure to object to the aggravator of 'under sentence of imprisonment' and the claim alleging counsel's failure to present additional evidence at the *Spencer* hearing"). Both the lower court's January 2000 Order granting an evidentiary hearing on penalty-phase issues, and the court's ruling on the merits of those issues in its post-hearing July 2004 Order, plainly reflect a factual determination by the court that these issues were *not* procedurally barred. This determination was well within the lower court's discretion and should not be disturbed. *See Huff v. State*, 762 So.2d 476, 481 (Fla. 2000); *see also Chacon v. State*, 735 So.2d 569, 569 (Fla. 2d DCA 1999) ("Because the trial court did not deny the motion [as procedurally barred] but rather addressed it on its merits, we do as well.").

1. Carter's Second-Hand "Investigation" Was Inadequate and Did Not Support a Reasonable Choice to Forgo Mental Health Mitigation Evidence.

The State relies entirely upon the mitigation materials prepared by the investigator, Jeffrey Geller, while ignoring the fact that Carter himself, the lawyer for Mr. Sims who admittedly bore "exclusive responsibility" for the penalty phase (ROA 1171), never personally interviewed *anyone* – including Mr. Sims – concerning possible sources of mitigation evidence. There is no evidence that Carter ever talked to Mr. Sims' mother, siblings, friends or girlfriends about mitigation leads prior to the penalty-phase hearing, nor did he ever speak directly to Geller either before or after his services were rendered, although Geller's report was available to him months in advance of the guilt-phase trial. (ROA 1172-74). Carter never even met with his own client, Mr. Sims, to explain or discuss the penalty phase or the importance of mitigation-evidence preparation. (ROA 1280). At no time did anyone ever explain to Mr. Sims why a candid, detailed history of childhood abuse or other personal information could be of vital importance at the penalty phase. (ROA 1262). Moreover, there is no suggestion in Geller's interview reports that he ever attempted to explain the concept of mitigation or the importance of the information he was seeking to any of the people he interviewed.

In short, it is undisputed in this case that – other than reviewing a sheaf of paper records and interview notes assembled by an investigator whom he

never met or even spoke to – Carter did *nothing* to prepare a penalty-phase presentation on behalf of Mr. Sims.[5] Given the obviously preliminary nature of the Geller materials, Carter should have immediately recognized that some independent investigation was necessary. The Geller materials are largely devoted to research into Officer Stafford's background. (E.g., DX C § 25). Most of the interview summaries are less than a page in length, some only a few sentences. (DX C). Contrary to the State's suggestion, the invoice that accompanied the Geller report made clear that Geller stopped investigating once the initial $1,000 budget ran out. (DX C § 25; ROA 1178).[6] As Mr. Potolsky opined, the Geller materials may have been a useful starting point for a competent investigation by counsel, but they did not come close to meeting the prevailing norms among capital defense counsel for an entire investigation. Any reasonably competent defense attorney would have immediately recognized that additional investigation

---

[5] Contrary to the lower court's finding, there is no evidence in the record that "an investigator named Geller went [to California]" (ROA 927), and Carter's trip to California was principally in connection with guilt-phase preparation. There is no evidence that Carter did anything to develop the penalty-phase presentation while in California. That Carter perhaps made a few phone calls to inform witnesses about the penalty-phase hearing date does not improve the abysmal quality of his investigation.

[6] The State claims that Geller's invoice and accompanying letter suggest that "Geller felt free to do work beyond the allotted amount." Opp. Br. at 69. It is clear, however, that Carter never asked Geller to follow up on the many open items and suggestions for further investigation in the Geller materials, nor did Geller take it upon himself to follow up. Carter should have recognized that more was needed and begun his own investigation and requested additional funds.

was necessary to develop a rigorous mitigation case. And even though no further prompting should have been required, the Geller materials themselves indicate that the investigation was only preliminary, repeatedly stating that "additional attempts [to locate mitigation evidence] can be made should you request." (DX C §§ 6, 15, 16, 19, 22, 23). Despite this explicit notice that the materials compiled by Geller were incomplete and recommended additional investigation, Carter did nothing.[7]

The State nevertheless contends that Carter reasonably could forgo any follow-up on any of the leads suggested in the Geller materials and could reasonably abandon a mental-health evaluation merely because he failed to "s[ee] the need." Yet Geller was not a lawyer, but a lay investigator with no mental health expertise or qualifications. Carter also admitted at the evidentiary hearing that he had no mental-health expertise and was not qualified to perform mental or other health evaluations or diagnosis. (ROA 1286). Despite the shocking passivity of Carter's omissions, the State here offers no explanation or excuse for Carter's failure to follow up on any of the myriad open items and indicators in the Geller

[7] In a telling attempt to come up with an example of Carter doing something that could be characterized as mitigation investigation, the State points out that Johnny Cooper testified at the trial, despite the fact that the Geller materials indicated that Geller had been unable to contact Mr. Cooper. The State notes that "someone made efforts to locate this witness," speculating that perhaps it was Carter that did so. Opp. Br. at 73.

materials that the investigator's work was preliminary in nature. *See* Initial Br. at 23-24.

Under the standard of capital representation proposed by the State in this case, counsel in a death penalty case could reasonably outsource his entire investigation, take a handful of second-hand interview memos prepared by a non-lawyer and make critical decisions to forgo a major avenue of potential mitigation evidence – without interviewing *anyone* personally; without taking any steps whatsoever to ensure that family members and friends understand the nature and importance of mitigation evidence; and without even consulting anyone qualified to make a professional medical or mental-health evaluation of the defendant. (ROA 1182). Moreover, under the standard espoused by the State, capital counsel also could reasonably fail to take these basic measures even where the prosecutor acknowledged in open court that the defendant was entitled to a medical evaluation (ROA 1480), and counsel himself had no doubt that the court would authorize more money for further investigation – if only defense counsel made the request (ROA 1179). Well-established law rejects the shockingly low standard advocated by the State here.

Indeed, as noted in Mr. Sims' Initial Brief, the United States Supreme Court has clearly instructed that counsel's decision to forgo a potential avenue of mitigation cannot be reasonable unless "the investigation supporting counsel's

decision . . . *was itself reasonable*." *Wiggins v. Smith*, 539 U.S. 510, 523 (2003) (emphasis in original). If counsel's "failure to investigate thoroughly resulted from inattention, not reasoned strategic judgment," then counsel was constitutionally ineffective. *Id.* at 526. This Court's decisions on ineffective assistance of counsel in the death-penalty context are firmly in accord with *Wiggins.* It is the attorney's obligation to be diligent and explore all possible angles for mitigation evidence. *Rose v. State*, 675 So.2d 567, 571 (Fla. 1996); *Porter v. Singletary*, 14 F.3d 554, 557 (11th Cir. 1994). Here, because Carter abdicated his "strict duty" to conduct a meaningful investigation of his own, *Ragsdale*, 798 So.2d at 716 (internal quotation marks omitted), Carter had no reasonable factual basis to exclude whole avenues of mitigation investigation, and no reasonable basis for concluding that a mental-health evaluation would not be fruitful. In this case, the evidence that Carter's failure to pursue mental-health mitigation resulted from inattention, not reasoned strategic judgment, could not be more glaring.

2. Even the Preliminary Materials Prepared by Geller Should Have Prompted Carter to Pursue Mental Health Mitigation Evidence.

Even assuming *arguendo* that Carter reasonably could have relied on Geller's mitigation materials alone – without conducting any investigation of his own – there is no foundation for the State's contention that, on the basis of Geller's report, a reasonable attorney could abandon any further pursuit of mental-health

mitigation. To the contrary, a reasonable attorney pursuing mitigation evidence on behalf of his client readily could have perceived the potential mitigation value of a mental-health evaluation. This is particularly so where, as here, the attorney admittedly understood that emotional and psychological factors could provide the basis to present at the penalty-phase hearing a mitigated version of the defendant's conduct. (ROA 1182).

The State further contends that the Geller materials do not contain "any mention of any behavior that would lead anyone to conclude that Defendant had any psychological issues." Opp. Br. at 58. Yet, Dr. Golden – a board certified neuropsychologist whose credentials the State does not question – expressly testified otherwise. After reviewing the Geller materials, he opined that "[a]nybody with a history like that you would want to do a full evaluation." (ROA 1074). Moreover, the State does not deny that even Geller's report, although preliminary and incomplete on its face, contained numerous indications 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). Nor does the State attempt to gainsay the repeated indications in those materials that Mr.

Sims had been emotionally traumatized by his father's death in 1989 and that thereafter "Merrit seemed to lose control" (DX C §§ 7, 8, 10) – a strong signal of noticeably altered behavior resulting from emotional or psychological distress. Indeed, the Geller materials squarely contradict the State's suggestion that these events did not result in "behavioral changes" in Mr. Sims. *See* Opp. Br. at 62.

Further, the State's suggestion that there was no mental health evidence for Carter to discover is plainly refuted by the fact that Dr. Golden was quite easily able to obtain it. Dr. Golden interviewed Mr. Sims and his family members and discovered a wealth of information regarding the traumatic nature of Mr. Sims' upbringing, his abusive father, and his history of drug and alcohol abuse. (ROA 1002). Moreover, Mr. Sims testified that the abuse and other family history that Dr. Golden described was in all respects accurate. (ROA 1262). These facts were available to Carter, had he bothered to meet with Mr. Sims' family members – or, even more obviously, Mr. Sims himself – to prepare for the penalty phase. The only reasonable inference from the record is that, if Carter had even bothered to have a single frank and sustained conversation with Mr. Sims about mitigation evidence and the penalty phase, he would have gained access to this vein of potential mitigation material.[8]

---

[8] The fact that Dr. Golden was able to uncover these facts further underscores the importance of an attorney conducting a rigorous mitigation investigation and (continued…)

3. No Strategic Rationale Existed for Carter's Failure to Present Mental Health Evidence.

The State never attempts to offer an informed, strategic rationale for Carter's failure to develop or present mental health mitigation evidence. Carter himself frankly admitted that he had no strategic basis for not pursuing this avenue. (ROA 1209). In fact, the failure to follow up on the mental health issues in the Geller materials or otherwise take steps to develop mental health evidence is even more egregious in this case because Carter was not pursuing any another coherent strategy. Rather, however perfunctory, Carter's only "strategy" for the penalty phase was to present a mitigated version of events based on emotional and psychological factors. (ROA 1204). Under such circumstances, the failure to conduct a rigorous investigation and pursue clear indications of mental health factors was objectively unreasonable and affirmatively harmful to Mr. Sims. *See Hardwick v. Crosby*, 320 F.3d 1147, 1164 (11th Cir. 2003) (holding that the "failure to present mitigation evidence as to a defendant's family background or alcohol and drug abuse at the penalty phase of a capital case constitutes ineffective assistance of counsel, particularly when defense counsel 'was aware of

---

not wholly delegating this responsible to a non-attorney third party. *See, e.g.*, *Ragsdale*, 798 So.2d at 716; *Goodwin v. Balkcom*, 684 F.2d 994, 805 (11th Cir. 1982) (to satisfy their duty to investigate mitigation evidence, attorneys "have a duty to interview potential witnesses and make an independent examination of the facts, circumstances, pleadings, and laws involved." (internal quotation marks omitted)).

[petitioner's] past and knew that *mitigation was his client's sole defense.'"* (emphasis in original) quoting *Elledge v. Dugger,* 823 F.2d 1439, 1447 (11th Cir. 1987)).

Rather than identifying any basis for informed, strategic choices with respect to these facts, the State offers up strained rationalizations for Carter's inaction. For example, the State declares that it was perfectly reasonable for Carter to chalk up Mr. Sims' emotional devastation following his father's death to ordinary "grief," since "[g]rief is a normal emotion universally experienced by well adjusted individuals." *See id.* The State appears to forget, however, that "well adjusted individuals" – even grieving ones – do not normally kill police officers, and that the penalty phase of Mr. Sims' trial (for which Carter supposedly was preparing) would not be reached unless the jury *rejected* Mr. Sims' guilt-phase argument that he acted as a "reasonable person," in self-defense. It was not reasonable, much less diligent or zealous, for capital-defense counsel to assume – entirely on the basis of preliminary second-hand interview notes – that this avenue of mitigation was not worth pursuing. This Court should not endorse the State's *post hoc* attempt to find excuses for Carter's torpor.

The cases cited by the State, *see* Opp. Br. at 58, 61, lend no support to its position. In *Williams v. Head*, 185 F.3d 1223 (11th Cir. 1999), cited at page 58 of the State's brief, defense counsel had learned of the defendant's prior stay in a

mental facility, where a full evaluation yielded negative results, and was advised by a senior physician at the facility "that there was no reason to conduct another evaluation of him." *Id.* at 1238 n.8, 1239-40. The *Williams* court further held that counsel had made a considered strategic decision not to pursue another evaluation in order to avoid the risk that defendant would be re-committed and his defense would be prejudiced. *Id.* at 1239-40. In contrast, Carter admitted that he had used mental-health professionals in capital cases before (ROA 1181-82); that his mitigation arguments relied on psychological assertions about Mr. Sims' mental state (ROA 1204); and that there was "no risk involved" in hiring a mental health professional to evaluate Mr. Sims (ROA 1244). Far from supporting the State's argument, the comparative diligence of counsel in *Williams* only highlights Carter's dereliction of duty here.

The other cases cited by the State are also plainly distinguishable from the circumstances presented here. In *Correll v. Dugger*, 558 So.2d 422 (Fla. 1990), cited at page 61 of the State's brief, defense counsel plainly was aware of expert mental-health evidence concerning the defendant, because the defendant had been interviewed and examined prior to trial by a psychiatric professional, whose findings were negative. *Id.* at 425. Furthermore, the defendant in *Correll* continued to maintain throughout the penalty phase that he had not committed the crimes – four gruesome, premeditated murders, *see id.* – in contrast to Mr. Sims,

who sought only to establish mitigating circumstances. Finally, there is no basis in *Correll* to infer that the defendant's counsel in that case relied entirely upon second-hand reports and failed even to confer with the family members who testified in the penalty phase until five minutes before the hearing. *See id.* at 426 n.3. The State's reliance upon a single footnote in *Correll* is unpersuasive.[9]

Finally, the State's contention that the circumstances of this case are "diametrically opposite" to those in *Ragsdale v. State*, State Br. at 64, cannot withstand scrutiny.[10] To the contrary, although Ragsdale's history of abuse and mental-health problems were perhaps more lurid and extreme than Mr. Sims', the similarities between crucial aspects of *Ragsdale* and the present case are striking:

- In *Ragsdale*, the defendant's trial counsel put on one witness, "who provided minimal evidence in mitigation," 798 So.2d at 716. Here, Carter put on a handful of grossly unprepared witnesses, who provided minimal evidence in mitigation and, in some instances (and to Carter's obvious surprise), *aggravating* testimony harmful to Mr. Sims, *see* Initial Br. at 16-17, 85-86.

---

[9] The other cases cited by the State, *Melendez v. State*, 612 So.2d 1366 (Fla. 1992), and *Baldwin v. Johnson*, 152 F.3d 1304 (11th Cir. 1998), *see* Opp. Br. at 58, are equally unhelpful to the State. In *Melendez*, the defendant refused to allow presentation of mitigation evidence and sought the death penalty as part of a tactical "gamble." 612 So.2d at 1368. In *Baldwin*, defense counsel had personally discussed with his client "the possibility of having Baldwin examined psychiatrically" and they had jointly decided against it. 152 F.3d at 1314. No such circumstances exist here.

[10] The *Ragsdale* decision cited by the State, 720 So.2d 203 (Fla. 1998), reversed a lower court's denial of a Rule 3.850 evidentiary hearing; that case did not articulate substantive standards of ineffective assistance. *See id.* at 208-09. The relevant citation is 798 So.2d 713 (Fla. 2001).

- In *Ragsdale*, although the defendant's mental-health expert testimony was substantially rebutted by the State's expert, this Court concluded that "there was available evidence from experts which would have supported substantial mitigation but which was not presented during the penalty phase," including two statutory mental mitigators, 798 So.2d at 718. Here, the testimony of Dr. Golden was completely uncontradicted, and demonstrated that expert was available who, as in *Ragsdale*, would have testified to the presence of two statutory mental mitigators.
- In *Ragsdale*, this Court found defense counsel's penalty-phase investigation deficient in part because he "did not talk to any family members himself" and relied on second-hand reports from his wife, 798 So.2d at 719; here, Carter never conferred directly with anyone – not even Mr. Sims, much less any family members – and relied on terse, second-hand interview notes from a hired investigator whom Carter never met or consulted.

In short, *Ragsdale* does not undercut the merit of Mr. Sims' present appeal, but rather strongly supports it. Because Carter's failure to pursue a mental-health evaluation deprived Mr. Sims of critical mitigation evidence that would have materially enhanced his penalty-phase presentation, his sentence should be vacated and a new penalty-phase hearing ordered.

B. Carter's Deficient Investigation Deprived Mr. Sims of Critical Fact Witnesses.

In addition to forfeiting the opportunity to develop and present the testimony of a mental health professional, Carter's failure to investigate deprived Mr. Sims of key fact witnesses that would have materially changed the evidentiary picture for the jury. While the State attempts to defend the lower court's conclusory dismissal of Mr. Sims' hearing witnesses as too "remote," Opp. Br. at 71, the State's Brief only highlights the inexcusable paucity of the mitigation

evidence elicited by Carter at the penalty-phase trial.[11] The lower court's summary rejection of Mr. Sims' argument on this point is refuted by substantial evidence and should be rejected by this Court.[12]

The State misses the point of the fact-witness testimony presented by Mr. Sims at the Rule 3.850 hearing. It is not a serious response to Mr. Sims' presentation of extensive testimony concerning his strong employment history that Carter happened to elicit at the penalty-phase hearing one or two passing mentions of Mr. Sims' work at McDonald's as a high-school student. *See* Opp. Br. at 73. Even the State admits that Mr. Thomas's testimony went much further, "establish[ing] that Defendant was a good person who worked hard, got along with co-workers and did not get into fights." *Id.* at 72. Carter's failure to pursue this important evidence was inexcusable, particularly since even Geller's report put him on direct notice of its availability. Clearly, even where some perfunctory testimony has been presented, a finding of ineffective assistance can be grounded on the unreasonably deficient *quality* of the evidence offered to save the

---

[11] Perhaps the most telling example of the State's grasping at straws is its suggestion that Carter demonstrated "zealous and effective advocacy" merely by causing Mr. Sims' mother to show up at the hearing. Opp. Br. at 74. Carter's failure to alleviate Mrs. Sims' distrust of the justice system and to elicit more than broken, fragmentary testimony from her at the hearing exemplify his woefully lackluster and deficient performance.

[12] Indeed, the lower court's Order is based on an erroneous calculation of Mr. Thomas's experience as relating to a period "6 to 12 years" before the shooting of Officer Stafford. In fact, the shooting occurred in 1991, and Mr. Sims worked for Mr. Thomas until the late 1980s. ROA 971.

defendant's life. *See, e.g., State v. Lara*, 581 So.2d 1288, 1289 (1991) (granting new penalty phase based in part on deficient witness examinations, including the examination of the main penalty phase witness that consumed only "seven pages in the transcript"); *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"); *see also Socor v. State*, 883 So. 2d 766, 772 (Fla. 2004) (attorney deficient because "witnesses receive no more preparation from counsel" than perfunctory discussions with counsel immediately before testifying).

Had Carter diligently pursued mitigation witnesses, he would have been in a position to demonstrate that Mr. Sims had a great potential for rehabilitation and a productive life within the prison system – attributes this court has held are key elements of a mitigation case. *Stevens v. State*, 552 So.2d 1082, 1086 (Fla. 1989); *Cooper v. Dugger*, 526 So.2d 900, 902 (Fla. 1988). Moreover, the testimony of witnesses such as Mr. Terry and Ms. Cox, who knew Mr. Sims well as a young child, cannot be viewed in a vacuum, as the State and the lower court reflexively attempt to do. Rather, that testimony presented at the Rule 3.850 hearing would have dovetailed dramatically with the powerful mitigation evidence that, as Dr. Golden's interviews with family members and Mr. Sims demonstrated, could have been elicited by Carter from the witnesses at the hearing – had he made

reasonable efforts (as opposed to "five minutes in the hallway") to prepare them. The testimony of Terry and Cox also would have provided potent and highly sympathetic corroboration of the testimony of a mental-health expert such as Dr. Golden, providing a compelling human context for the disabling behavioral disorder that Dr. Golden described.

With a modicum of effort and preparation, Carter could have presented a dramatically different picture of Mr. Sims from the one that Carter allowed to emerge at the penalty-phase hearing. Since the actual jury vote was 8 to 4, only two more jurors had to be swayed to spare Mr. Sims' life. Especially when viewed as a whole, the evidence of ineffective assistance and prejudice here is compelling and cries out for relief from this Court.

C. Carter Failed to Ensure the Jury Was Properly Instructed on Mr. Sims' Parole Eligibility.

While conceding that "both the court and defense counsel mistakenly suggested that Defendant's possible sentences were death or life with the possibility of parole after 25 years," the State nevertheless suggests that the "jury was unambiguously instructed" on the fact that Mr. Sims would not be eligible for parole. Opp. Br. at 78-79. In fact, there is ample basis to conclude that the jury did not clearly understand that Mr. Sims would never be eligible for parole. As detailed in Mr. Sims' Amended Initial Brief, throughout the trial and penalty phase, there were numerous misstatements by the trial court and by Mr. Sims' own

attorneys telling the jury that Mr. Sims would be eligible for parole if sentenced to a term of imprisonment.[13] Initial Brief at 87-91. In fact, even after this error was raised by the prosecution, the court once again gave an incorrect instruction to the jury. (T. 1570). Most gravely, it appears that the advisory verdict form provided by the trial court to the jury once again incorrectly stated that Mr. Sims would be eligible for parole. (ROA Dir. 539).

Although the State urges this Court to speculate that the official record of the trial court and this appeal are not accurate, this Court should rely on the documentary record before it, not on supposition. *Rhines v. Ploff Transfer Co., Inc.* 313 So.2d 791, 792 (Fla. 1st DCA 1975). Accordingly, given the critical importance of accurately instructing the jury on a defendant's parole eligibility, and the impact that an inaccurate verdict form could have on the jury's consideration, it was incumbent upon Carter to inspect the verdict form and ensure that the jury received it. Having failed to maintain the integrity of the record, the State should not be heard to contend that this Court should simply assume that the corrected verdict form, which is not in the record, actually reached the jury.

---

[13] Once again, the State contends that claim is procedurally barred, even though the trial court rejected the State's argument and granted an evidentiary hearing on the issue. ROA at 388. In fact, Mr. Sims' claim of ineffective assistance was not procedurally barred because, as discussed above, "a claim of ineffectiveness generally can be raised in a rule 3.850 motion but not on direct appeal." *Bruno v. State,* 807 So.2d 55, 63 (Fla. 2002).

Carter's failure to adequately address this issue was ineffective assistance, resulting in manifest prejudice to Mr. Sims.

D. Carter Did Essentially Nothing to Defend Mr. Sims Following the Jury's Recommendation.

While Carter's advocacy before the jury could hardly qualify as zealous (or even competent) representation, Carter can only be described as having given up on his client following the jury recommendation. Despite having weeks to prepare for argument to the trial court, and despite the trial court's expectation that Carter would present evidence and argument to the court, Carter did essentially nothing to fight for his client's life. (T. 1604-05). Carter submitted a Sentencing Memorandum that not only failed to present evidence or make substantive arguments on behalf of Mr. Sims, but was replete with nonsensical statements and typographical errors. (ROA Dir. 544). Then with one last chance to fight for his client's life, Carter opted to make no argument at all before the court at the *Spencer* hearing (T. 1609) and failed to object when the court rendered a decision the same day as the hearing. The State's attempt to characterize these decisions as "strategic," on the grounds that the court had already heard the evidence, is transparent: It cannot be reasonable for an advocate to give up on

advocacy, on the defeatist assumption that it will make no difference. Carter's failure was deficient and further prejudiced Mr. Sims.[14]

E. Mr. Sims Has Overwhelmingly Established Prejudice.

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 Carter standing alone is sufficient to require a new penalty phase hearing, the ineffectiveness and prejudicial impact of Carter's ineffective assistance is even more inescapable when viewed cumulatively. At every stage of the penalty phase proceeding, Carter forfeited the chance to present the jury and the court with critical mitigation evidence could have led reasonable jurors to recommend a life sentence, rather than death. Accordingly, as this Court stated in *Ragsdale*, this "record establishes that counsel essentially rendered no assistance to [the defendant] during the penalty phase of trial. Thus, as the penalty phase of [the] trial was not subjected to meaningful adversarial testing, counsel's errors

---

[14] The sentencing memorandum and the *Spencer* hearing were within the scope of the lower court's order granting an evidentiary hearing on Carter's failure to "investigate *and present* mitigation evidence." (emphasis added.) The court's arbitrary exclusion of this evidence from consideration in its July 30, 2004 Order should not be sustained.

deprived [the defendant] of a reliable penalty phase proceeding." 798 So.2d at 716.

Particularly in a case like this – where, despite manifestly ineffective representation, the jury voted to recommend the death penalty by only an 8-to-4 margin – Carter's numerous failures were so significant as to undermine confidence in the outcome of the proceeding. *See, e.g., Garcia v. State*, 622 So.2d 1325, 1329 (Fla. 1993) (had trial counsel not made an error at the sentencing hearing, the result might have been different because "four jurors voted for life imprisonment even" with the mistakes made by counsel); *Riechmann*, 777 So.2d at 350 (noting that even a 9-to-3 vote for the death penalty demonstrates that the jury "was already ambivalent about their recommendation.").

III. CARTER HAD A CONFLICT OF INTEREST THAT COMPROMISED HIS REPRESENTATION OF MR. SIMS.

In his Amended Initial Brief, Mr. Sims demonstrated that one of Mr. Sims' attorneys, Arthur Carter, was ineffective due to a material conflict of interest that undermined his representation and satisfied the test of *Cuyler v. Sullivan*, 446 U.S. 335 (1980). As Carter admitted (and the State acknowledges), during the period when he represented Mr. Sims, Carter was under investigation by several state authorities, including the same authorities that were prosecuting Mr. Sims. ROA 1186-87. These investigations, which were never disclosed by Carter to Mr. Sims, ultimately led to Mr. Carter being disbarred. *Id.*

Although the State on one hand cites *Cuyler* for the two elements of a claim for ineffective assistance based on a conflict of interest (Opp. Br. at 47), the State elsewhere suggests that the U.S. Supreme Court's decision in *Mickens v. Taylor*, 535 U.S. 162 (2002), limits *Cuyler* to cases involving conflicts based on multiple concurrent representations. Opp. Br. at 48-49. But Cuyler should not be read so narrowly. Even after *Mickens*, both this Court and the Eleventh Circuit have applied *Cuyler* to conflict cases not involving concurrent representation of multiple defendants. *See, e.g.*, *Elledge v. State*, 911 So.2d 57, 73-74 (Fla. 2005); *Herring v. Sec'y, Dep't of Corrections*, 397 F.3d 1338, 1356-57 (11th Cir. 2005).[15]

The State also complains that Mr. Sims has not sufficiently demonstrated how Carter's representation was impaired by the conflict, arguing that the "mere suggestion that counsel is under investigation by the same prosecuting agency is insufficient to establish an actual conflict exists." Opp. Br. at 51. In fact, however, a fair reading of Mr. Sims' Initial Brief demonstrates that

---

[15] But even if this Court were to rule that *Strickland*, rather than *Cuyler*, supplies the appropriate test for this claim, Mr. Sims would still prevail. As Mr. Sims has demonstrated, Carter's performance was objectively unreasonable under prevailing professional norms because his representation of Mr. Sims while suffering from a conflict of interest violated the Florida Bar Rules (and the case law of various courts, including the Eleventh Circuit). Mr. Sims has pointed to ample evidence of prejudice resulting from Carter's conflict, such as Carter's failure to retain mental-health and other experts, and his failure to adequately investigate mitigation evidence. Had Carter provided competent representation, two or more additional jurors might well have concluded that Mr. Sims' life should be spared.

he has done far more than merely suggesting the existence of a conflict. Rather, Mr. Sims' brief set forth numerous grounds of ineffective assistance, during both the penalty and guilt phases, that can be directly traced to Carter's desire to minimize the cost and expenses involved in representing Mr. Sims. Among other things, Carter failed to hire mental-health and crime-scene experts, limited the budget for Geller's investigation of mitigation evidence, and failed to put in the time and effort necessary to follow-up on mitigation evidence leads, prepare the witnesses, or make competent penalty phase presentations. Each of these instances of ineffective assistance can be traced to Carter's desire to minimize further scrutiny of his billing and expenses in a court-appointed case.[16]

---

[16] The State also contends that Mr. Sims's conflict of interest argument is procedurally barred because it should have been brought on direct appeal. State Br. at 46-47. The State relies on *Henderson v. Singletary*, 617 So.2d 313 (Fla. 1993) to support its argument. *Henderson* is easily distinguished from this case. In *Henderson*, the defendant failed to raise his conflict-of-interest ineffectiveness argument until the (then-applicable) two-year period for filing a rule 3.850 motion had expired and the late filing was not excused. *Id.* at 316. Here, Mr. Sims timely raised his conflict-of-interest ineffectiveness argument. Moreover, this Court has repeatedly held that ineffective assistance claims can be brought on direct appeal only when the factual record is developed and the "ineffectiveness is apparent on the face of the record." *Gore v. State*, 784 So.2d 418, 437-38 (Fla. 2001). Mr. Sims needed, and requested, an opportunity to develop the facts supporting his claim an evidentiary hearing, which the lower court denied. At a minimum, this Court should grant Mr. Sims an evidentiary hearing to develop the factual basis for this claim.

IV. THE TESTIMONY OF MR. POTOLSKY SHOULD BE CONSIDERED BY THIS COURT.

Even without the testimony of Steven Potolsky, Mr. Sims clearly established that Carter was ineffective at the penalty phase of Mr. Sims' trial. Nevertheless, Mr. Potolsky's testimony illuminates the prevailing standards of professional conduct for the capital defense bar in Florida. As it did in *State v. Reichmann*, 777 So.2d 342, 349 (Fla. 2000), this Court should consider his testimony when considering the conduct of Carter in this case.

CONCLUSION

For the foregoing reasons, as well as those set forth in detail in his Amended Initial Brief, Mr. Sims respectfully requests that this Court vacate his death sentence and underlying convictions and grant him a new trial. In the alternative, Mr. Sims requests that this court vacate his death sentence and grant him a new penalty-phase trial as to sentencing.

Respectfully submitted,
MERRIT ALONZO SIMS

December 20, 2005

By: _____

P. Benjamin Duke
Scott D. Danzis
admitted *pro hac vice*
COVINGTON & BURLING
1330 Avenue of the Americas
New York, NY 10019
Telephone: (212) 841-1000
Facsimile: (212) 841-1010

Benjamin S. Waxman
ROBBINS, TUNKEY, ROSS, AMSEL,
RABEN, WAXMAN & EIGLARSH, P.A.
2250 Southwest Third Avenue, 4th Floor
Miami, FL 33129
Telephone: (305) 858-9550
Facsimile: (305) 858-7491

Attorneys for Appellant Merrit Alonzo Sims

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this Reply Brief has been delivered this 20th day of December 2005 to:

Margarita I. Cimadevilla
Assistant Attorney General
Office of the Attorney General
Rivergate Plaza, Suite 950
444 Brickell Avenue
Miami, FL 33131

Scott D. Danzis
admitted *pro hac vice*
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004
Telephone: (212) 841-1000
Facsimile: (212) 841-1010

CERTIFICATE OF COMPLIANCE

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

December 20, 2005

Scott D. Danzis
admitted *pro hac vice*
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004
Telephone: (212) 841-1000
Facsimile: (212) 841-10