IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-1879

MERRIT ALONZO SIMS,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, CRIMINAL DIVISION

BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF CASE AND FACTS

Defendant was charged, in an indictment filed on July 17, 1991, in the Eleventh Judicial Circuit of Florida in and for Miami-Dade County, Florida, case number F91-22048, with committing: (1) the first degree murder of Charles Stafford, a law enforcement officer, (2) the armed robbery of Charles Stafford, and (3) the unlawful possession of a firearm by a convicted felon. (DAR. 1)[1] The crimes were alleged to have been committed on June 11, 1991. *Id.*

After the trial court granted Defendant's motion to sever the charge of possession of a firearm by a convicted felon, the matter proceeded to trial on the remaining counts on January 3, 1994. (DAT. 378) The jury found Defendant guilty as charged on the two remaining counts, and the trial court adjudicated Defendant guilty in accordance with the verdicts. (DAR. 495-496) After a penalty phase proceeding, the jury recommended a sentence of death for the murder of Officer Stafford by a vote of eight to four. (DAT. 1600) The trial court followed the jury's recommendations and imposed a death sentence on March 18, 1994. (DAR. 556) The trial court also sentenced Defendant to

[1] The symbols "DAR" and "DAT" will refer to the record on appeal and transcript of proceedings from Defendant's direct appeal, Florida Supreme Court Case No. 83,612, respectively. The parties will be referred to as they stood in the lower court.

seventy-five years on the robbery count and ordered that the sentences be served consecutively. *Id.*

Defendant appealed his convictions and sentences to this Court raising the following eleven issues:

> Whether the trial court erred by: (1) admitting the testimony of Sims' parole officer, then refusing to allow the defense to rebut that testimony; (2) allowing the prosecutor's misrepresentations of Sims' testimony during the state's rebuttal case; (3) allowing insufficient evidence to sustain Sims' convictions for robbery and felony murder; (4) allowing the prosecutor's improper closing argument; (5) excusing venireperson Hightower for cause; (6) refusing to consider evidence of imperfect self-defense as a mitigating circumstance; (7) refusing to instruct the jury that Sims' age at the time of the crime was a statutory mitigating circumstance; (8) refusing to give Sims' recommended limiting instruction on the avoiding arrest aggravator; (9) submitting the felony murder aggravator to the jury; (10) inadequately evaluating the aggravating and mitigating circumstances in the sentencing order; and (11) rejecting Sims' challenge to the constitutionality of Florida's capital sentencing statute.

Sims v. State, 681 So. 2d 1112, 1113 n.2 (Fla. 1996).

This Court affirmed Defendant's convictions and sentences on July 18, 1996. *Id*. The opinion of this Court includes the following findings of fact:

> Charles Stafford, a Miami Springs police officer, followed Sims as he drove onto state road 112 on June 11, 1991. Premised upon his belief that Sims was driving a stolen car, Officer Stafford, in full uniform and driving a clearly marked police car, signaled to Sims to pull over on the exit ramp. It was subsequently discovered that Sims had borrowed the car from his cousin, Sam Mustipher, but when Sims failed

> to return the car as promised, Mustipher reported it stolen.
>
> As Officer Stafford was handcuffing him, Sims struck the officer in the head with his police radio, robbed him of his police pistol, and shot him twice. Sims admitted shooting Officer Stafford, who subsequently died from his wounds, but asserted from the outset that he had done so in self-defense after Officer Stafford had choked him, used racial epithets, and repeatedly threatened to kill him. After the shooting, Sims drove to a park and threw the gun into a river. He spent the night in his car, changed his clothes in the morning, and found a friend to cut the handcuff off his arm. Four days later, Sims arrived by bus in California searching for his former girlfriend and their two children. He testified that he intended to surrender to police the next day, but panicked and tried to escape when the police arrived. Sims confessed to the crime and waived extradition.
>
> Sims was convicted of first-degree murder and armed robbery. The court found six aggravating circumstances, (FN1) no statutory mitigating circumstances, and attributed little or no weight to the nonstatutory mitigating circumstances presented by the defense.
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> ****
>
> (FN1) Aggravating circumstances: (1) the murder was committed while the defendant was under sentence of imprisonment; (2) the defendant had a prior violent felony conviction; (3) the murder was committed in the course of another felony (armed robbery); (4) the murder was committed to avoid arrest; (5) the victim was a law enforcement officer; (6) the capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or enforcement of laws.

Id. at 1113. Defendant's motion for rehearing was denied on October 24, 1996. Defendant then sought certiorari review in the United States Supreme Court, which was denied on April 28, 1997. Si*ms v. Florida,* 520 U.S. 1199 (1997).

On April 8, 1998, Defendant filed a motion for post conviction relief (R. 32-82)[2] and simultaneously a Motion to Disqualify Judge Carney from hearing said motion. (R. 83-88) The motion to disqualify was denied on December 21, 1998. (R. 242)

Defendant then filed an amended motion for post conviction relief on June 29, 1999 (R. 251-320) and a renewed motion to disqualify on August 23, 1999 (R. 358-380). The renewed motion to disqualify was denied on January 4, 2000. (R. 386-387)

The amended motion set forth the following five claims:

> I.
> [DEFENDANT] WAS DENIED HIS CONSTITUTIONALLY GUARANTEED RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION BECAUSE TRIAL COUNSEL FAILED TO SEEK TO BLOCK THE ADMISSION OF TESTIMONY CONCERNING THE SEARCH OF AN AUTOMOBILE BY A CANINE ALLEGEDLY TRAINED IN NARCOTICS DETECTION.
>
> II.
> [DEFENDANT] WAS DENIED HIS CONSTITUTIONALLY GURANTEED RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION BECAUSE COUNSEL FAILED TO OBJECT TO IMPROPER REMARKS DURING THE PROSECUTOR'S CLOSING ARGUMENT.
>
> III.
> [DEFENDANT] WAS DENIED THE EFFECTIVE ASSISTANCE OF CONFLICT-FREE COUNSEL IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES

[2] The symbols "R" will refer to the record on appeal in the instant appeal.

CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION BECAUSE OF THE POTENTIAL OR ACTUAL CONFLICT OF INTEREST OF HIS TRIAL COUNSEL.

IV.

[DEFENDANT] WAS DENIED HIS CONSTITUTIONALLY GURANTEED RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION BECAUSE TRIAL COUNSEL FAILED TO OBTAIN AN EXPERT IN FORENSIC CRIME SCENE RECONSTRUCTION TO TESTIFY AT TRIAL AND/OR TO ASSIST COUNSEL TO CROSS-EXAMINE THE STATE'S WITNESSES.

V.

[DEFENDANT] WAS DENIED HIS CONSTITUTIONALLY GURANTEED RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION BECAUSE THE REPRESENTATION PROVIDED BY TRIAL COUNSEL AT THE PENALTY/SENTENCING PHASE OF THE TRIAL FELL BELOW ANY OBJECTIVE STANDARD OF REASONABLE COMPETENCE.

(R. 257-308)

After the State's response and Defendant's reply briefs were filed, the court held a *Huff* hearing on July 14, 1999. (R. 8) On January 4, 2000, the court ordered an evidentiary hearing on the following three issues: (1) failure to investigate and present mitigation evidence, (2) failure to retain a mental health expert and timely obtain other witnesses, and (3) failure to allege to the jury that if Defendant were sentenced to life, he would allegedly never be eligible for parole. (R. 388) The court's order further stated that "all other issues raised by

Defendant's counsel will not be considered at that time." (R. 388)

On July 16, 2002, Defendant then filed a supplemental post conviction motion raising a sixth claim, to wit, that under *Ring v. Arizona*, the Florida statute pursuant to which Defendant was sentenced is unconstitutional and Defendant's sentence must, therefore, be vacated. (R. 789-801)

At the evidentiary hearing, which was held on February 18 and 19, 2003, and at which eight witnesses testified,[3] Defendant called Dr. Charles Golden. Dr. Golden testified that he had been contacted by post-conviction counsel in 1999, and had been asked to conduct a psychological evaluation of Defendant. (R. 1001) He stated that in conducting said evaluation he considered three different types of data. He stated that he first reviewed existing records pertaining to the case such as the trial transcript, penitentiary records, police reports and depositions. (R. 1002) He also conducted various psychological and personality tests, including the MMPI, the Rorschach Ink Blot Test, the WAIS, the Wechsler Memory Scale and a subset of the Halstead Rayten Neuropsychological Test Battery. (R. 1004)

[3] The testimony of Steven Potolsky, a legal expert, was heard but then excluded by the court at the conclusion of the hearing after the State renewed its motion to preclude the testimony.

Finally, Dr. Golden stated, he also conducted interviews of several members of Defendant's family (R. 1002)

Dr. Golden testified that his evaluation led him to conclude that Defendant suffered a longstanding personality disorder, that at the time of the murder Defendant was "under excessive emotional agitation," and that at the time he killed Officer Stafford Defendant was "undergoing a series of personal stressors which may have also been influencing (sic) and made worse by alcohol." (R. 1002)

Dr. Golden further testified that the cognitive testing performed on Defendant showed that his performance was within normal range, even above average in some instances. (R. 1011) There was no evidence of brain injury or other deficit. (R. 1011)

Dr. Golden stated that, in reviewing the records pertaining to the case, he also reviewed the records prepared by an investigator hired by Defendant's trial counsel prior to trial in 1994. He opined that the records contained evidence the Defendant had a "history of learning and potential emotional problems and neuropsychological problems which needed further investigation" and that "the records themselves in (sic) the evaluations done were highly inadequate." (R. 1003)

Dr. Golden further opined that the personality profile he drew from the personality test results indicated "significant personality difficulties," and that Defendant had problems dealing with emotional stimuli. (R. 1018) Among those difficulties, Dr. Golden listed Defendant's hypersensitivity to changes in other people's behavior and his trouble forming deep relationships due to his fear of commitment and of getting hurt. (R. 1019) Dr. Golden concluded that, although Defendant has very low self-esteem, he tries to appear highly functional. (R. 1019) He further stated that Defendant often makes mistakes regarding other people's intentions and that he fails to perceive his own bias, which results in his failure to recognize his "misperceptions" of reality, but that Defendant is neither hallucinatory nor delusional. (R. 1020-21) Dr. Golden also opined that people with Defendant's personality profile tend to withdraw when placed under stress. (R. 1021) He further stated that Defendant displayed typical "passive/aggressive" traits in that he blamed others for his problems and directed those negative feelings inward causing him to have low self-esteem. (R. 1027)

Dr. Golden stated that his assessment of Defendant as a passive withdrawn sub type of the passive/aggressive personality type was consistent with his review of Defendant's criminal

record. Specifically, his assessment was supported by the fact that during an incident in which Defendant had taken a gun from a tow truck driver who was repossessing his car, Defendant did not to shoot the driver despite having the opportunity to do so. (R. 1028) Dr. Golden's assessment was further supported by the fact that during an unrelated armed robbery, Defendant did not hurt anybody. (R. 1029)

Dr. Golden diagnosed Defendant as having personality disorder N.O.S. (not otherwise specified) (R. 1032) and that, although this conclusion was reached based on an assessment conducted in the year 2000, in his opinion, the disorder was present at the time of the crime in 1991. (R. 1034)

Dr. Golden testified that, in addition to interviewing Defendant, he also met with his three sisters, his mother and his aunt. (R. 1036) From those interviews, Dr. Golden learned that Defendant's father was a functional alcoholic who was violent and unpredictable, and who spent considerably more time with the children than Defendant's mother. He also learned that Defendant's mother worked many hours, was the stricter disciplinarian, was not physically affectionate, and frequently used corporal punishment. (R. 1036-42) He further learned from these interviews that Defendant's parents fought frequently and that the children spent a lot of time at their grandmother's

house, where they received the primary source of nurturing. (R. 1039) He further learned that, growing up, Defendant lived in several bad neighborhoods. (R. 1044-45)

Dr. Golden further testified that his review of various depositions of family members taken at the time of the trial, which he took into consideration for his evaluation, generally express that the Sims' household was happy and normal. (R. 1045-46) Dr. Golden further admitted that Defendant himself told Dr. Golden that his family had nothing to do with what he had done. (R. 1046)

Dr. Golden also learned through the interviews with family members that Defendant had been devastated by the death of his father, as well as two other parent figures in his family. Specifically, that Defendant felt guilty about having been out of the state at the time of his father's death and about having left issues unresolved with him. (R. 1049-50) Dr. Golden further opined that these losses led to Defendant's increased depression, lowered self-esteem and binge drinking, which all contributed to the Defendant's mental state at the time he committed multiple crimes, including the murder of Officer Stafford. (R. 1053-56)

Defendant also presented the testimony of three facts witnesses: Mr. Stanley Thomas, Ms. Rosylen Cox and Mr. Timmie

Terry. Mr. Thomas testified that he had met Defendant in the early eighties at which time Defendant had sought work at the construction company where Mr. Thomas was employed. (R. 967) He stated that Defendant was a good worker; that he was Defendant's supervisor for three years, and that Defendant had eventually gained some supervisory responsibilities. (R. 968-69) Mr. Thomas further testified that Defendant communicated well with other workers and that he never got into fights with coworkers while under his supervision. (R. 969-70)

Mr. Thomas testified that Tier Construction no longer existed and that he currently owned a trucking company. (R. 966) He stated that he had remained in touch with Defendant after he departed the company for which both worked. (R. 971) He stated that, despite the fact that he believed Defendant confided in him about his life, he had only met one of Defendant's children and did not know of Defendant's three other children. (R. 978) He also did not know that Defendant had been charged with robbery. (R. 979)

He testified that Defendant had called him after the murder and had told him about what had happened (R. 983) and that he had remained in touch with the family and had called Defendant's house at the time the trial was proceeding. (R. 981)

Mrs. Rosylen Cox, one of Defendant's elementary school teachers, testified that she knew Defendant while he was in elementary school (in summer school) in the seventies; that he was well liked; and that he was quiet, honorable and well-dressed. (R. 1136-37) Mrs. Cox testified that her contact with Defendant from the age of 18 until the time of the murder was limited to seeing him around the neighborhood. (R. 1144)

Mr. Timmie Terry testified that he had met Defendant in 1979, when Defendant was in the sixth grade, in his capacity as a teacher at Earlington Heights Elementary School (R. 1151); that Defendant was an obedient, quiet boy (R. 1152-53); and that he never knew Defendant to be involved in any violence at that time (R. 1153-54). Mr. Terry testified that he had last seen Defendant in 1979. (R. 1157)

Defendant next called Arthur Carter, Defendant's trial counsel, to testify. Mr. Carter testified that he, along with Clinton Pitts, had represented Defendant at trial in 1994. (R. 1169-70) He stated that, at the time of Defendant's trial, he had previously represented other capital defendants at trial, including representation during both the guilt and penalty phases (R. 1170), and that he had specifically prepared for approximately seventeen (17) penalty phase hearings of which approximately seven were actually conducted (R. 1181).

Mr. Carter stated that Clinton Pitts had hired an investigator to assist in the preparation of the case (R. 1171-72) and that he had done so even before Mr. Carter had been assigned to the case. (R. 1216) He stated that Mr. Geller, the investigator, provided him with a collection of reports that detailed his investigation. (R. 1173) Mr. Carter stated that he knew Mr. Geller to be a seasoned investigator, and therefore, trusted the reliability of his reports (R. 1216) and that he did not ask him to do any further investigation subsequent to the preparation of the reports. (R. 1174)

Mr. Carter testified that, despite Defendant's insistence that the mitigation aspect was not important, his client's statement to Geller on this matter did not affect how he went about preparing for the penalty phase. (R. 1180-81) He stated that it was his practice to hire mental health experts when he saw the need. (R. 1181) He was aware that Defendant had suffered a head injury in infancy (R. 1183) and that Defendant had had a number of untreated injuries subsequently. (R. 1185) Mr. Carter also stated that during all the investigation done in preparation for the penalty phase he did not encounter any evidence that a psychological evaluation was appropriate. (R. 1226)

He stated that he did not meet in person with Defendant's pastor, Reverend Johnny Cooper, prior to the day he testified at the penalty phase proceeding. (R. 1198) He stated that he had contacted Defendant's mother, who did not want to come to testify at said proceeding but eventually did, and that he had discussed her testimony, for approximately five minutes, outside the courtroom just prior to her testifying. (R. 1199) He stated that, although he did not meet in person with Defendant's sisters, he did have telephone discussions with them regarding their penalty phase testimony, but then stated he had no present recollection of having done so. (R. 1199-1200)

Mr. Carter further stated that he did not submit any further evidence to the court after the jury returned its recommendation because he felt the sentencing memorandum was sufficient (R. 1203) and because it would have been duplicitous. (R. 1236) Mr. Carter stated that he did not seek to admit psychological evidence to support the contention that at the time of Officer Stafford's murder Defendant was in a state of great stress and fear because Defendant could testify to that fact himself. (R. 1210)

He stated that all the family members and friends of Defendant who were interviewed had indicated that Defendant was a good child, who had enjoyed a good upbringing, and parents who

loved him, and that at no time during his representation of Defendant did anyone bring to his attention any indication that Defendant had a psychological disturbance or any instance of Defendant's aberrant behavior. (R. 1228-29) He also stated he thought it would be foolish to present to a jury testimony from individuals who only had knowledge of Defendant many years prior to the time of the murder. (R. 1232-33) Mr. Carter also stated he traveled to California to investigate information that was possibly helpful to the preparation of the case and for which he requested additional costs from the court. (R. 1239-40)

Defendant also testified at the evidentiary hearing. He stated that it was Clinton Pitts who told him that the investigator would come to interview him. (R. 1259) That he shared with Geller that his father had died because he abused alcohol and that, although he did not have a specific recollection of telling Geller that his father's death and his two arrests were the only traumatic events in his life, he had no reason to doubt the accuracy of that statement in Geller's report. (R. 1264) He also stated that Mr. Carter had fallen asleep during their meeting and that he had told Mr. Pitts about that incident. (R. 1281)

Defendant called Steven Potolsky to testify as an expert in the trial of capital cases.[4] Potolsky testified that he had personally conducted two capital penalty phase proceedings and had prepared more than ten before 1994. (R. 1290) He opined that the representation rendered by Arthur Carter in the preparation of and during the penalty phase fell below the standard of reasonably competent counsel and that there was a reasonable probability that, but for this deficiency, the result of the proceeding would have been different. He stated that, in formulating this opinion, he never discussed any of the issues with either Carter, Pitts or Defendant. (R. 1348)

Defendant also introduced at the hearing the report prepared by Investigator Geller at the behest of defense counsel Clinton Pitts, in preparation for both the guilt phase and penalty phase of the trial. (DX C)[5] This report contains a summary of all investigative efforts made by Geller to ascertain evidence helpful to the defense, including mitigation evidence. The report includes numerous records pertaining to Officer Stafford, hospital records pertaining to Defendant, Defendant's school records, mitigation data provided by Defendant, and

[4] The testimony of Potolsky was later struck by the court on a renewed motion by the State.

[5] The symbol DX will refer to Defense Exhibits at the evidentiary hearing (the designation "CP" is part of the page numbering on the original Defense Exhibit "C").

summaries of various interviews with Defendant's family and friends.

Specifically, the hospital records from Jackson Memorial Hospital revealed that Defendant had a head injury at the age of 1, at which time a skull X-ray series was performed, which revealed no fracture. (DX C CP3344) The records further indicate that there was no loss of consciousness and that the patient's pupils were equal and reactive. (DX C CP3347) Records from Miami Christian Hospital, where Defendant was born, were sought but not found, as the institution no longer existed at the time of the investigation. (DX C CP3361) Defendant's school records revealed that Defendant graduated from Miami Northwestern Senior High with a 1.9 G.P.A. and ranked 271 out of a class of 402. (DX C CP3352)

The report also contains a five page summary of mitigation data provided by Defendant. It recounts Defendant's version of his upbringing as adequate, and his school performance as average. Regarding his upbringing Defendant specifically reported that he was never beaten or abused by his parents, nor did he ever observe any violence between his father and mother, or between his father and siblings, and that he received common childhood punishment. (DX C CP3355) It further details that Defendant informed the investigator that his father had overused

alcohol but refused to discuss the matter in further detail as he felt it had nothing to do with the case, and that his father's death and two arrests were the only traumatic events in Defendant's life. (DX C CP3355-56) Defendant further reported he had four children and had never married; that he had planned to join the army but his arrest had made it impossible; that he never abused narcotics or alcohol; that he felt he was wrongly charged in his prior arrest; and that he believes in God and had been baptized in 1990. (DX C CP3356) Defendant then provided the names of various family members, the mothers of his children, friends, and other acquaintances, including attorneys who had previously represented him, ministers, corrections officers with whom he had been friendly, bosses and supervisors. He further recounted several injuries, including a stab wound and several falls that involved striking his head for none of which he had sought treatment.

Mr. Geller conducted several interviews with members of Defendant's family, including his sisters Brenda Sims, Cathy Sims and Patricia Speights, and Defendant's mother Annie Sims. They all generally reported the Defendant was a quiet child who did not get into trouble and who enjoyed a normal family life. (DX C CP3363-71) The summaries of these interviews provide additional details regarding Defendant's parents and their

history. They also track much of the same events reported by Defendant, such as his move to California, his plans to join the army, how his arrest derailed said plan, and the deep sorrow Defendant felt over the death of his father. All the family members interviewed also expressed their dislike for the criminal justice system.

Mr. Geller also interviewed one of the mothers of Defendant's children, Tranae Rogers, who reported having a long relationship with Defendant and described Defendant as a good father and a faithful man who came from a good home. (DX C CP3373) She further reported that in her six or seven year relationship with Defendant he had never mentioned any form of abuse having occurred in his family home. She further described Defendant as a passive, non-violent man. Geller reported that his attempts at finding Renee Colon, the mother of Defendant's other children, were unsuccessful. (DX C CP3397)

Geller also interviewed Mervin Simmons, one of the three individuals whom Defendant identified as his friend, and the only one for whom he provided specific contact information. Simmons reported a fifteen year friendship with Defendant. He reported that Defendant did not get into trouble and was favored by his parents as he was the only male child. He described Defendant as a generous and quiet person. (DX C CP3375)

The report also contains the summary of an interview with another of Defendant's longtime friends, Travis Johnson. He reported knowing Defendant since childhood and growing up together in the same neighborhood. Johnson was, at the time of the interview, in the U.S. Air Force Military Police. He also described Defendant as quiet and passive. (DX C CP3377)

Defendant's babysitter, Georgella Kelly was also interviewed. She described Defendant as a quiet child and reported she was not aware of any problems in the family.

Geller reports attempts to locate Defendant's pastor, Reverend Johnny Cooper, Defendant's friend, Willie Spain, and the former owners and employees of Tier Construction, none of which were successful. He reports the only contact information provided for Willie Spain was that he lives in the Ocala area "somewhere west of I-75" and that the Tier Construction company, as reported by Defendant, was no longer in business.

The report summarizes other attempts at investigating Defendant's employment history, including a request for employment records of the McDonalds Corporation pertaining to Defendant, which were unsuccessful because the company only retained records of the past five years.

Geller also reports having left several messages for Defendant's former boss, Tim Buntain, who had not returned any of the telephone calls at the time the report was prepared.

Geller also attempted to find several individuals with respect to statements they had made during the background investigation conducted as part of Police Officer Stafford's application for employment with the Police Department.

Finally, the last page of the exhibit is an invoice, addressed to Clinton Pitts, detailing the hours spent on each of the investigative efforts detailed above. It specifies an hour was spent on November 13, 1992, on an "initial conference/briefing," an hour spent on January 5, 1993, on a "law office conference," a third hour spent on January 6, 1993, on obtaining defense information at law office, and two additional hours spent on law office conferences on April 8 and April 23, 1993. The invoice further details four hours spent interviewing Defendant on three separate dates, four hours spent interviewing Defendant's three sisters, and three hours spent interviewing Defendant's mother. Geller spent an hour reviewing discovery material for "lead information." The remainder of the thirty four and a half (34½) hours detailed on the invoice was spent obtaining and reviewing a variety of records. Furthermore,

Geller specified that not all of the time spent attempting to locate witnesses was included in the invoice. (DX C)

After the evidentiary hearing, the court denied Defendant's amended motion in its entirety. (R. 926-27) In that order, the court also granted the State's renewed motion to exclude the testimony of Steven Potolsky on the grounds that his testimony was not such that it would aid the trier of fact on matters that are beyond the scope of the trier's knowledge. It is from that denial that Defendant files the instant appeal.

SUMMARY OF THE ARGUMENT

The lower court properly rejected the claims of ineffective assistance of counsel at the guilt phase. These claims are procedurally barred and facially insufficient. Moreover, these claims are meritless. The lower court properly denied the claim of ineffective assistance of counsel based on an alleged conflict of interest as said claim is procedurally barred and facially insufficient. The lower court properly denied the claim that counsel was ineffective at the penalty phase, as its findings that counsel's performance was not deficient and that no prejudice was established are amply supported by competent and substantial evidence and Defendant failed to prove his claims at the evidentiary hearing. With respect to the lower

court's exclusion of the testimony of Steven Potolsky, Defendant's expert on ineffective assistance of counsel, Defendant fails to establish that the court abused its discretion. The claim of unconstitutionality under *Ring v. Arizona* is meritless.

ARGUMENT

I. THE LOWER COURT PROPERLY REJECTED THE CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNEL AT THE GUILT PHASE.

Defendant asserts that the lower court erred in rejecting his claims that his counsel was ineffective at the guilt phase without granting an evidentiary hearing. He first asserts that counsel was ineffective in failing to object to the introduction of canine alert evidence. Next, he asserts that counsel was ineffective for failing to mount a competent defense to the State's crime scene testimony. Third, he asserts that trial counsel was ineffective for failing to object to the prosecution's allegedly improper summation.

A. CANINE ALERT EVIDENCE

Defendant asserts that the lower court erred in denying his amended motion to vacate in its entirety without granting an evidentiary hearing to determine whether counsel was ineffective

for failing to object to the introduction of evidence that a drug sniffing dog had given a positive alert for cocaine at the car that Defendant had driven on the day of the murder. However, the lower court correctly denied the claim summarily as the claim is procedurally barred and without merit.

This Court has "consistently recognized that 'allegations of ineffective assistance of counsel cannot be used to circumvent the rule that post-conviction proceedings cannot serve as a second appeal'" *Cherry v. State*, 659 So. 2d 1069, 1072 (Fla. 1995)(citing *Medina v. State*, 573 So. 2d 293, 295 (Fla. 1990)). Defendant does not proffer any facts supporting this claim that were not already known at the time of direct appeal. There is no reason why this claim could not have been brought then and it is, therefore, procedurally barred.

Moreover, this claim fails to meet the two prongs set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). It is well established that in order to allege a claim of ineffective assistance of counsel sufficiently, Defendant must demonstrate both that counsel's performance was deficient and that the deficient performance prejudiced the defense, which requires a showing that counsel's errors were so serious as to deprive the defendant of a trial whose result is reliable. *Id.* Deficient performance requires a showing that counsel's representation

fell below an objective standard of reasonableness under prevailing professional norms, and a fair assessment of performance of a criminal defense attorney:

> requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. . . . [A] court must indulge a strong presumption that criminal defense counsel's conduct falls within the wide range of reasonable professional assistance, that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.

Id. at 694-695.

Even if a criminal defendant shows that particular errors of defense counsel were unreasonable, the defendant must show that they actually had an adverse effect on the defense in order to establish ineffective assistance of counsel. The test for prejudice requires the defendant to show that, but for counsel's unprofessional errors, there is a reasonable probability that the result of the proceeding would have been different, or, alternatively stated, whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt. *Id.* at 694.

Defendant first claims that trial counsel failed to object to the introduction of the canine alert evidence on the basis that the State had failed to establish a proper foundation for

the introduction of said evidence in that no testimony was elicited as to the dog's reliability and past performance. This claim fails for two reasons.

First, Defendant fails to establish that counsel's performance in this respect fell below standard as there was no basis to object to the evidence. Not only was there testimony that the dog, along with its handler, Det. Silva attended a thirteen week training conducted by the United States Customs, which has been using canines in the detection of drugs since the early '70's, but Det. Silva also testified that the dog had gone out thousands of times to detect a variety of illegal substances over a period of six years. (DAT. 1081-82) Furthermore, Det. Silva stated he had testified several times in state court and at least eight times in federal court regarding his dog Jake's detection of illegal substances. He explained his methodology in conducting a search and explained that the response from the dog is readily distinguishable as an alert to the odor of one of the illegal substances the dog is trained to detect. (DAT. 1083-84) There was ample testimony to support the introduction of this evidence.

Defendant argues that the law in Florida at the time of his trial was clear as far as the legal basis for challenging canine alert evidence. He cites *State v. Foster*, 390 So. 2d 469 (Fla.

3d DCA 1980), and *Matheson v.* State, 870 So. 2d 8 (Fla. 2d DCA 2003), in support of this proposition. Defendant is correct that the standard for evaluating the admissibility of canine evidence had long been established by 1991. In 1937, this Court held that bloodhound scent tracking evidence was competent and admissible, provided a proper foundation establishing the dog's character and dependability had been laid. *Tomlinson v. State*, 129 Fla. 658, 661 (1937). The Court further found that such a foundation had been laid, where there had been testimony that the witness had used the dog as a man-trailer for several months. *Id.* In 1986, this Court, in deciding a different issue involving canine evidence, specifically cited to *Tomlinson,* stating that it was not changing the law with that respect. *Ramos v. State*, 496 So. 2d 121, 123 (Fla. 1986). As this standard was met, there was no basis for an objection.

In *Foster*, the court enumerated several factors that should be taken into consideration in determining whether a canine alert provides sufficient probable cause to search, one of them being the dog's "track record." Not only did the court not require each and every one of the elements be met, but, in reversing the lower court's suppression of the evidence, the court placed a great deal of weight on the fact that, as in the

instant case, multiple other courts had previously recognized the particular canine's olfactory capacities.

Furthermore, whether a canine alert is sufficiently reliable to establish probable cause is an entirely different issue than whether a proper foundation has been established to admit the alert into evidence. In the case of probable cause, one needs to establish that there is probable cause to believe that drugs are present at the time of the search. A canine is generally trained to detect the odor of drugs that can linger long after the drugs are no longer present, as in the instant case. This was the thrust of why the court in *Matheson* held that the State had not established probable cause. The court was concerned that if the canine was alerting to a lingering odor, the alert was not sufficient to establish probable cause that a crime was being presently committed. This is entirely inapplicable to a determination of whether the canine was reliable in the instant case, as the testimony was precisely that he alerted to an odor, as no narcotics were subsequently found.

Contrary to Defendant's assertion, in *Green v. State*, 641 So. 2d 391 (Fla. 1994), this Court did not hold that scent-tracking evidence is admissible only after a showing of character and dependability of the dog. Rather, this Court

upheld the lower court's admission of the scent tracking evidence, where such a showing had been made. The issue before the Court in *Green* was one of relevance because there had been no showing that the footprints the canine had alerted to had, in fact, been the defendant's. The Court held that the lower court had sufficient evidence of reliability, including the dog's training and dependability, as well as other corroborating evidence. In any event, this Court's opinion in *Green* was rendered several months after Defendant was sentenced and is, therefore, irrelevant to a determination of whether counsel's actions at the time were reasonable. See *Nelms v. State*, 596 So. 2d 441, 442 (Fla. 1992)(counsel not ineffective for failing to predict future change in the law).

Defendant provides no other support to establish that it was unreasonable for counsel not to object to the foundation of the canine alert evidence, and as such, he fails to meet the first prong of *Strickland.*

Secondly, Defendant fails to meet the prejudice prong of *Strickland*. Had counsel objected at that point, there is no evidence to suggest that the remedy would have been exclusion rather than allowing the State to ask additional questions to further establish the dog's training and reliability. Defendant has failed to establish that the dog was, in fact, not properly

trained or unreliable such that, if counsel had objected, the evidence would have been precluded. Thus, this claim should be rejected as it is facially insufficient. *Ragsdale v. State*, 720 So. 2d 203, 207 (Fla. 1998).

Defendant also contends that counsel should have sought records on Jake, the canine. However, he again fails to make any allegations as to what these requests would have yielded that would have resulted in the exclusion of the evidence.

Defendant next claims that counsel was ineffective in failing to object to the canine evidence on the grounds that its prejudicial effect outweighed its probative value. Defendant fails to establish the prejudice prong of *Strickland*. The record clearly shows that if an objection had been made it would have, most likely, been overruled. Immediately preceding the beginning of jury selection the State had moved in limine to preclude mention of a traffic stop that had occurred approximately one week prior to the murder of Officer Stafford. During the oral argument on that motion, counsel fully elaborated on his opposition to this evidence, and the court had made its feelings clear on the matter. (DAT. 383)

> MR. PITTS: . . . there is no evidence in this case that my client was in possession of drugs.
>
> THE COURT: Okay. Is that correct?

MS. LEHNER: No. I believe there will be evidence that there were drugs in the vehicle that the defendant was driving at the time.

MR. PITTS: That's not true. The testimony of the officer who had the dog come up said he didn't find any drugs.

MS. LEHNER: The thrust of the motion . . .

THE COURT: I will – since I have a clash of opinions, in any event, as to what the facts will show with regard to possession of drugs or no possession of drugs, on the motion the Court will rule at this time that I have not considered that in ruling on the motion that it really is relevant to the motion, and grant the motion

And by the way, if there is some question as to whether or not he did have drugs, what do you plan to do in your opening statement . . .

MR. ROSENBERG: Well, possession, the word possession can be interpreted in a number of ways, Judge. There is going to be testimony and it will be part of the state's theory that the reason for the murder of Officer Stafford is that the defendant was transporting drugs at the time. There will be evidence that there were drugs in that car, and we will have testimony concerning the people who drove the car and whether or not they carried any drugs at the time. So there is going to be evidence, and part of the state's theory and motive is that the defendant is transporting drugs at the time and that's the reason for the killing. "Possession" is the term used, whether you have it in your hand or in the car. And the evidence can be proved in a number of different ways . . .

MR. PITTS: There is not going to be any witness that we know of that's going to come here and say Merrit Sims was transporting drugs in that vehicle. The vehicle did not belong to Merrit Sims.

THE COURT: Who was driving the vehicle?

MR. PITTS: Merrit Sims at one point.

> THE COURT: Well, then, I would have to say that it's a matter for the jury. And if it's a matter for the jury, both sides can make the argument that they want to make about whether or not he was transporting drugs.

(DAT. 384-386)

Despite knowing that the court had expressed its opinion that this was a matter for the jury, counsel again fully articulated his position immediately following Det. Silva's testimony, when the State called Defendant's parole officer to testify. It was at that time that the State fully explained what it had alluded to in the pre-trial motion, as far as its theory of motive. As the two testimonies were inextricably woven as they, together, established the State's theory on motive, it became appropriate at that time to argue the entirety of the motive evidence, that is, the drug alert testimony that had just been heard, and the proposed testimony of Officer Lynn. That is precisely what counsel did. The court dismissed counsel's argument that the drug alert evidence and the parole evidence were more prejudicial than probative and expressly stated that "this was an issue for the jury."

> MR. ROSENBERG: The reason for her coming in is to show the paper indicating the defendant knew, if he is violating the law by using or possessing narcotics, he was violating his controlled release from state prison. She's the one that read the form to him.

MR PITTS: I haven't heard any evidence that he possessed or used narcotics.

THE COURT: I have heard evidence that I think is enough to go to the jury on the presence of drugs in the car.

MR PITTS: This officer here testified that the drugs could have been there for a long time.

THE COURT: I understand that, but it's still a jury question that may be subject to argument.

(DAT. 1096)

The court then asked for the issue to be briefed by both parties as to whether the evidence that Defendant was on controlled release at the time of the crime should be admitted. The next morning the issue of the canine evidence was again revisited as the two issues were inextricably woven.

MR. CARTER: Number 1, to be admitted, he needs to first of all be able to show that there was, in fact, drugs in the car. And there is no crime charged in the indictment itself. They don't charge that particular crime. It's not relevant to motive at all.

The – what they are doing is putting inference on inference, and there is an inference that he had drugs in the car but no proof whatsoever. I think the Court has to have clear and convincing evidence that there was, in fact, drugs in the car.

I think the testimony of the officer was that it could have been in this – drugs could have been in this for at least a year.

THE COURT: I don't recall him testifying as to that at all . . .

MR. CARTER: There was some testimony that it didn't have to be in the immediate – during the time that he had the car, though.

> THE COURT: Uh-huh.
>
> MR. CARTER: Which could put it outside of his control. Therefore, if you can't connect him to the drugs, then it's not relevant to prove anything . . .
>
> THE COURT: Okay. I am going to allow the testimony. I will overrule the defense . . .

(DAT. 1103-04) Defendant fails to show how counsel's objection a few moments earlier would have led to a different result. This claim is, therefore, facially insufficient and should be denied. *Ragsdale*.

Even if the trial court had suppressed the evidence, there is still no reasonable probability that the result would have been different. The evidence was introduced to establish motive, which is not an element of the crime. Furthermore, the jury heard testimony substantially weakening the impact of this evidence. During cross examination, Det. Silva testified that other factors can trigger an alert, including certain prescription medications that might contain cocaine; that no perceptible amount of cocaine was in fact recovered from the inside of the vehicle; and that a positive alert gives the handler no indication as to when the substance might have been present. (DAT. 1088-89) Therefore, even if the jury had been precluded from hearing any of the evidence relating the Defendant's drug possession or parole, and in light of the entirety of the evidence presented, there is no reasonable

probability that the exclusion of this evidence would have led to a different outcome.

Defendant claims that, at the very least, counsel was ineffective for failing to make an objection that would have preserved the issue for appeal. "To support a claim of ineffective assistance of trial counsel, not only must the defendant demonstrate that counsel's performance was deficient, he must also demonstrate that this deficiency affected the outcome of the *trial* proceedings." *Pope v. State*, 569 So. 2d 1241, 1245 (Fla. 1990)(citing *Strickland v. Washington*, 466 U.S. 668 (1984)(emphasis added)). Showing that if the canine evidence had been admitted over objection Defendant would have been entitled to a new trial is not dispositive. *Id.* "A showing that there is a reasonable probability that trial counsel's failure . . . actually compromised the defendant's right to a fair trial is required to support a claim of ineffective assistance of *trial* counsel." *Id*. (emphasis added) Defendant does not explain what factual determination needs to be made about this claim. In order for a claim to be facially sufficient, a defendant must make more than a conclusory assertion of both deficiency and prejudice. *Ragsdale,* 720 So. 2d at 207. Because Defendant has not sufficiently alleged that there is a reasonable probability that the outcome of his trial would have been affected by

counsel's alleged failure to object to the canine alert evidence, the trial court's summary denial of this claim was proper.

B. CRIME SCENE EXPERT

Defendant next alleges that trial counsel was ineffective for failing to challenge the State’s crime scene testimony. This claim was properly summarily denied by the lower as the claim is facially insufficient.

Defendant generally alleged that reasonably competent counsel would have retained a crime scene reconstruction expert to assist in the cross examination of the State’s crime scene expert, or to provide testimony that would explain how the physical evidence was consistent with Defendant’s version of the circumstances surrounding the murder. However, Defendant fails to specifically allege what a reconstruction expert would have testified to in this regard. In his amended motion, Defendant claimed that it was difficult to make specific assertions with respect to this claim, as he was still awaiting responses to multiple public records requests. Having received such records, Defendant’s allegation remained to be expanded upon with facts supporting it. Accordingly the lower court’s summary denial was proper.

This is particularly true in light of the record. During the cross examination of Det. Galan, the State's crime scene investigator, defense counsel asked several questions establishing that there was no way to tell whether the shell casings had been found in the exact place where they had originally fallen, after being ejected from the gun, and that it was possible that the casings had been kicked or otherwise moved. (DAT. 1345) Furthermore, during closing arguments, defense counsel addressed in detail how the physical evidence was consistent with Defendant's story. Having failed to allege sufficiently ineffective assistance, Defendant's claim fails on its face. *Ragsdale*. Accordingly, the lower court's summary denial was proper and should, therefore, be affirmed.

C. STATE'S CLOSING ARGUMENT

Defendant next asserts that the lower court erred in summarily denying his claim that counsel was ineffective in failing to object to the State's allegedly improper summation. This claim is procedurally barred and without merit.

Defendant specifically contends that counsel should have objected to portions of the summation where Defendant alleges that: (i) the State called Defendant a liar; (ii) the State injected personal opinion; (iii) the State suggested that

defendants habitually allege police officers threaten to kill arrestees and that the Officer should have killed Defendant; (iv) the State attacked defense counsel by suggesting the Defendant's testimony was rehearsed; (v) the State mischaracterized evidence by stating that defense counsel had not asked witness Otis Robinson if he had seen Defendant's picture in the paper prior to his line-up identification of Defendant when in fact defense counsel had asked the question; (vi) the State mischaracterized evidence by stating that counsel had misled the jury during his closing by stating that Defendant had testified he had turned his back not to get shot at when in fact Defendant had testified to that fact; (vii) the State mischaracterized evidence when the prosecutor dropped to his knees during closing argument which suggested that there was evidence that Officer Stafford was kneeling down when he was shot; and (viii) the prosecutor bolstered his own credibility by referring to the motto "those of us who labor here" which is displayed in some courtrooms and by stating he could not make up evidence.

This Court has held that claims that counsel was ineffective for failing to object to allegedly improper comments during closing argument are barred as a matter of law because the issue should have been raised on direct appeal. *Robinson v.*

State, 707 So. 2d 688, 697 & n.17 & 18 (Fla. 1998). As such, this claim is procedurally barred and was properly denied.

Moreover, each and every one of the comments Defendant now claims counsel was ineffective for not objecting to, formed the basis of Claim Number IV on direct appeal. This Court rejected it then. Since this issue was raised and rejected on direct appeal, it is procedurally barred. *Cherry v. State*, 659 So. 2d 1069 (Fla. 1995). Further, recasting the claim in terms of ineffective assistance of counsel does not negate the bar. *Harvey v. Dugger*, 656 So. 2d 1253, 1256 (Fla. 1995); *Medina v. State*, 573 So. 2d 293, 295 (Fla. 1990); *Swafford v. Dugger*, 569 So. 2d 1264, 1267 (Fla. 1990). As such, the lower court correctly denied this claim summarily as it is procedurally barred.

Moreover, in *Chandler v. State*, 848 So. 2d 1031 (Fla. 2003), this Court upheld the lower court's finding that the defendant had not established prejudice under *Strickland*, where this Court had found on direct appeal that the allegedly improper comments by the prosecutor in summation were not so prejudicial as to vitiate the entire trial. Here, this issue was raised on direct appeal. This Court did not find fundamental error regarding it. As such, under *Chandler*, this claim was properly denied.

Furthermore, Defendant fails to provide any legal support for his allegations that the comments complained of were so inflammatory as to undermine the outcome of the proceedings. Each comment that Defendant claims should have been objected to was either fair comment on the evidence and/or fair response to defense counsel's closing argument.

Defendant first complains that the State improperly accused him of lying. This Court has held that "[w]hen counsel refers to a witness or a defendant as being a 'liar,' and it is understood from the context that the charge is made with reference to testimony given by the person thus characterized, the prosecutor is merely submitting to the jury a conclusion that he is arguing can be drawn from the evidence." *Craig v. State*, 510 So. 2d 857 (Fla. 1987); *see also Davis v. State*, 698 So. 2d 1182 (Fla. 1997).

Each and every reference to Defendant lying in the State's summation cited by Defendant in his brief was directly preceded or followed by an explanation of how the physical or other evidence presented was inconsistent with Defendant's testimony: (i) ". . . his lies cannot meet the physical evidence" (DAT. 1416); (ii) "I put Dr. Mittleman on to show you this defendant, by the evidence, is a liar" (DAT. 1424); (iii) "You know the physical evidence proves him to be a liar" (DAT. 1425); (iv)

”The physical evidence shows him to be a liar” (DAT. 1430); (v) “He even lies to his own cousin” (DAT. 1433) (referring to Defendant’s testimony that he spoke to his cousin after the murder and told her he was bringing back the car and did not do so); and (vi) ”they [the items of physical evidence left on the scene] cry out to you that the defendant lied.” (DAT. 1438) The only reference to Defendant lying not directly linked to the evidence in the case was a comment by the prosecutor as to the general criteria the jury can use in evaluating a witness’ testimony and highlighting that, being the party with the most interest in the outcome of the case, Defendant had the strongest motive to lie. (DAT. 1419) None of these comments is impermissible. Therefore, Defendant fails to establish that a failure to object to them was deficient performance by counsel. *Kokal v. Dugger*, 718 So.2d 138 (Fla. 1998)(counsel not ineffective for failing to raise meritless issue); *Groover v. Singletary*, 656 So. 2d 424 (Fla. 1995); *Hildwin v. Dugger*, 654 So. 2d 107 (Fla. 1995); *Breedlove v. Singletary*, 595 So. 2d 8, 11 (Fla. 1992).

Defendant next complains that the State injected personal opinion and testified to matters outside the evidence by stating that in the prosecutor’s personal experience defendants often accuse police officers of threatening arrestees and that

Officer Stafford should have killed Defendant when he had the chance. This comment, taken in the proper context, was an attempt by the prosecutor to establish the implausibility of Defendant's testimony regarding the threats by Officer Stafford. The remark referred to the fact that Defendant testified the Officer was trying to kill him, and that the Defendant's own version of the events gave Officer Stafford an opportunity to do so had that been his real intention. This comment was not improper as it was fair comment on Defendant's claim of self-defense. Furthermore, an otherwise improper comment must be taken in context and evaluated under a totality of the record. See *Darden v. State*, 329 So. 2d 287 (Fla. 1976)(prosecutor calling defendant an animal was not so inflammatory and abusive as to deprive defendant of a fair trial where defense counsel had used a similar characterization and crimes were uniquely vicious). Since the comment was proper, counsel cannot be deemed ineffective for failing to object to it.

As to Defendant's claim that the first part of the comment was an impermissible reference to matters outside the record, it should be noted that, although generally improper, not every comment on a matter outside the record is necessarily fundamental error. *See Pope v. Wainwright*, 496 So. 2d 798, (Fla. 1986)(finding that prosecutor's comment regarding defendant's

demeanor while his girlfriend testified did not deprive defendant of a fair trial and prosecutor's comment during penalty phase summation about defendant's statement outside the jury's presence that he would rather be sentenced to death than spend the rest of his life in jail, although improper, were not sufficiently egregious as to fundamentally undermine the reliability of the jury's recommendation of a death sentence); *Conley v. State*, 592 So. 2d 723 (Fla. 1st DCA 1992)(finding prosecutor's comment stating that counsel's attack on rape victims was the reason many rape victims don't report the crime, although improper, not sufficient to merit reversal).

Defendant next states that trial counsel should have objected to a number of alleged attacks on his integrity when the prosecutor suggested that Defendant's testimony was rehearsed. These statements were fair comment on the Defendant's testimony in which Defendant answered almost every other question by stating that he was being choked and that he did not intend to kill Officer Stafford. Furthermore, in light of defense counsel's countless attacks on the State's character and credibility as he repeatedly stated that the State was merely using "smoke screens" to confuse the jury, any similar attack on defense counsel's integrity must be evaluated in said context and found to be fair and invited response. See *Whiten v. State*,

765 So. 2d 309 (Fla. 5th DCA 2000)(comment bolstering credibility of police witness not improper as invited response to defense's attack on witnesses credibility); *Broge v. State*, 288 So. 2d 280 (Fla. 4th DCA 1974)(prosecutor bolstering his own credibility proper rebuttal to defense counsel's allegation that State had suborned perjury). Since the comment was proper, counsel could not be deemed ineffective for failing to object to it.

Defendant next claims that the prosecutor mischaracterized evidence regarding the testimony of Otis Robinson as it pertained to his having seen the Defendant's picture prior to his identification. While the prosecutor misstated that Robinson had never testified that he had seen the Defendant's picture prior to the identification, there is no indication that this misstatement was intentional. Furthermore, the comment was prefaced by the assertion "I do not recall" which not only lessened whatever impact the misstatement may have caused, but also emphasized that it is the juror's recollection of the evidence and not what is argued in summation that controls. See *Rich v. State*, 807 So. 2d 692 (Fla. 3rd DCA 2002)(prosecutor's misstatments of the evidence not fundamental error).

Finally, Defendant states that the prosecutor impermissibly bolstered his own credibility by making reference to a motto, which is displayed in some courtrooms that states in substance

that “we who labor here seek only the truth,” and then stating that he could not just “make up evidence” and that he had not misled the jury. It is unclear that this comment is in fact a reference to the prosecutor’s own credibility as such motto would seem to include defense counsel, the judge and the jury as well. Furthermore, the statement that the prosecutor cannot make up evidence is simply highlighting the fact that the evidence presented speaks for itself. Moreover, in light of defense counsel’s running theme during his closing argument that the prosecutor had introduced certain evidence as a smoke screen to confuse the jury, the prosecutor’s comment that he had not misled the jury was fair response to defense counsel’s attack on his character. *See Broge*.

To the extent that the comments were improper, Defendant still fails to establish prejudice under *Strickland*. Trial courts generally give attorneys a great deal of latitude when it comes to summations. Had an objection been made and sustained to any of the comments complained of, the likely remedy would have been to remind the jury that argument is just that, that it does not constitute evidence, and that it is the jury’s recollection of the evidence that controls. Furthermore, it is clear from the record that the jury was given the standard instruction explaining that closing arguments do not constitute evidence

both at the beginning of the trial (DAT. 783) and immediately preceding the closing arguments. (DAT. 1377) When evaluating prejudice a court should presume "that the judge or jury acted according to law." *Strickland*, 466 U.S. at 694. This court must, therefore, presume that the jury followed that instruction. Thus, Defendant has failed to establish that, but for counsel's error, a reasonable probability of a different outcome exists. The claim was properly denied.

II. THE LOWER COURT PROPERLY DENIED THE CLAIM OF INEFFECTIVE ASSITANCE OF COUNSEL BASED ON AN ALLEGED CONFLICT OF INTEREST.

Defendant asserts that the lower court erred in summarily denying his claim that his trial counsel Arthur Carter was ineffective due to an actual conflict of interest stemming from the State's investigation of Mr. Carter's alleged overbilling in court appointed cases. This claim is procedurally barred and facially insufficient and was, therefore, properly summarily denied.

Defendant repeatedly cites to articles in the Miami Herald as support of his allegation that trial counsel Arthur Carter was being investigated by the State Attorney's Office at the same time he was representing Defendant. In light of the public forum in which these developments were being discussed at the

time, which included several front-page stories, Defendant must concede, that the facts that form the basis of this alleged conflict were public knowledge. This Court has previously barred a claim of ineffective assistance of counsel predicated on the existence of a conflict of interest where the facts underlying the conflict were public knowledge prior to a Defendant's filing of his post conviction motion. *Henderson v. Singletary*, 617 So. 2d 313 (Fla. 1993). This claim should have been brought on direct appeal. As it was not, this claim is procedurally barred.

Even if the claim were not procedurally barred, it was still properly denied summarily as the claim is facially insufficient. To establish a claim of ineffective assistance of counsel based on a conflict of interest, the defendant must demonstrate (1) that counsel actively represented conflicting interests, and (2) that this actual conflict of interest adversely affected his lawyer's performance. *Wright v. State*, 857 So. 2d 861 (Fla. 2003); *see also Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980)(ruling that in order to establish an ineffectiveness claim premised on an alleged conflict of interest, the defendant must "establish that an actual conflict of interest adversely affected his lawyer's performance.")

First, Defendant fails to show that a conflict in fact existed. In *Herring v. State*, 730 So. 2d 1264, 1267 (Fla. 1998), this Court noted that "[t]o demonstrate an actual conflict, the defendant must identify specific evidence in the record that suggests that his or her interests were impaired or compromised for the benefit of the attorney or another party." Moreover, in *Mickens v. Taylor*, 535 U.S. 162, 174-76 (2002), the Court made clear that *Cuyler* was a limited exception for conflicts of interest resulting from representation of multiple defendants. The Court pointed out that *Cuyler* was not intended to apply outside such a context and noted that it had never even applied the test to a successive representation case, let alone other claims of conflict of interest:

> It must be said, however, that the language of *Sullivan* itself does not clearly establish, or indeed even support, such expansive application. "Until," it said, "a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance." 446 U.S. at 350 (emphasis added). Both *Sullivan* itself, *see id.* at 348-349, and *Holloway*, *see* 435 U.S. at 490-491, stressed the high probability of prejudice arising from multiple concurrent representation, and the difficulty of proving that prejudice. *See also* Geer, Representation of Multiple Criminal Defendants: Conflicts of Interest and the Professional Responsibilities of the Defense Attorney, 62 Minn. L. Rev. 119, 125-140 (1978); Lowenthal, Joint Representation in Criminal Cases: A Critical Appraisal, 64 Va. L. Rev. 939, 941-950 (1978). Not all attorney conflicts present comparable difficulties. Thus, the Federal Rules of Criminal Procedure treat concurrent representation and prior

> representation differently, requiring a trial court to inquire into the likelihood of conflict whenever jointly charged defendants are represented by a single attorney (Rule 44(c)), but not when counsel previously represented another defendant in a substantially related matter, even where the trial court is aware of the prior representation. *See Sullivan, supra*, at 346, n. 10 (citing the Rule).
>
> This is not to suggest that one ethical duty is more or less important than another. The purpose of our *Holloway* and *Sullivan* exceptions from the ordinary requirements of *Strickland*, however, is not to enforce the Canons of Legal Ethics, but to apply needed prophylaxis in situations where *Strickland* itself is evidently inadequate to assure vindication of the defendant's Sixth Amendment right to counsel. *See Nix v. Whiteside*, 475 U.S. 157, 165, 89 L. Ed. 2d 123, 106 S. Ct. 988 (1986) ("Breach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel"). In resolving this case on the grounds on which it was presented to us, we do not rule upon the need for the *Sullivan* prophylaxis in cases of successive representation. Whether *Sullivan* should be extended to such cases remains, as far as the jurisprudence of this Court is concerned, an open question.

Id. at 175-76. In *Beets v. Collins*, 65 F.3d 1258 (5th Cir. 1995)(en banc), which was cited with approval in *Mickens*, the Court refused to apply *Cuyler* to conflicts of interest outside the area of multiple representations. In doing so, the Court reasoned that applying *Cuyler* to alleged conflicts of interest that were not based on multiple representation would allow the *Cuyler* exception to swallow the *Strickland* rule.

Here, Defendant does not claim a conflict of interest based on multiple representation. Instead, Defendant asserts that Carter had a conflict because he was being investigated for

allegations of overbilling by the State Attorneys' Office, and that because the presiding judge was on the Bar Committee, Carter had an incentive to incur fewer expenses in preparing the trial.

Defendant cites to *United States v. McLain,* 823 F.2d 1457 (11th Cir. 1987), in support of a finding of conflict where a defense attorney is under investigation by the same prosecuting agency that is prosecuting the case at issue. In *McLain*, the court found that the conflict adversely affected the representation because there was evidence that prolonging the trial was to the benefit of defense counsel. More recently, in *United States v. Novaton*, 271 F.3d 968 (11th Cir. 2001), the Eleventh Circuit found that, although it was unclear whether a conflict in fact existed or not where there was an allegation that the defense attorney was under investigation by the U.S Attorney's Office, Defendant had failed to show any adverse impact on the representation. *Id.* The court found that the facts presented to the lower court, namely a bill of particulars establishing that the defense attorney *may* have been an unindicted coconspirator and some notes from a meeting that appears to have taken place after the trial was over informing defense counsel's attorney that he was not under investigation, were insufficient to determine whether there was an actual

conflict. However, the court upheld the lower court's denial of the claim because the defendant had failed to establish adverse impact. It follows from both *McLain* and *Novaton* that the mere suggestion that counsel is under investigation by the same prosecuting agency is insufficient to establish an actual conflict exists. Other than making an unsupported allegation that the investigation created an incentive for Carter to minimize time and expense incurred in the preparation of the case, Defendant fails to establish how the investigation created a conflict.

Even if an actual conflict could be established, Defendant's claim fails for failure to show how the alleged conflict adversely affected his attorney's representation. In *Mickens,* the U.S. Supreme Court explained that, in its earlier decisions on conflict, when the court spoke of an actual conflict of interest it necessarily was speaking of a conflict which adversely affected counsel's representation. Without a showing of such an impact, a mere theoretical division of loyalties does not amount to an actual conflict of interest. *Id.* In order to establish adverse effect the Defendant must:

> . . . satisfy three elements. First he must point to some plausible alternative defense strategy or tactic [that] might have been pursued. Second, he must demonstrate that the alternative strategy or tactic was reasonable under the facts. Because prejudice is presumed, the [defendant] need not show that the

> defense would necessarily have been successful if [the alternative strategy or tactic] had been used, rather he only need prove that the alternative possessed sufficient substance to be a viable alternative. Finally, he must show some link between the actual conflict and the decision to forgo the alternative strategy of defense. In other words, he must establish that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interest.

Novaton 271 F.3d at 1011 (quoting *Freund v. Butterworth*, 165 F.3d 839 at 860).

In his brief, Defendant merely argues that "the record of this case is replete with errors and failures committed by Carter that have no reasonable strategic basis" (Defendant's Brief, p.68) without any further elaboration. Defendant goes on to say that the errors began in the guilt phase but were "inescapably obvious during the penalty phase where Carter had sole responsibility." (Defendant's Brief p. 69) Furthermore, in his brief's fact section, Defendant claims that his amended motion to vacate contended that representation in the *penalty phas*e was deficient as a result of the conflict. (Defendant's Brief, p.19) However, careful review of said motion reveals no such allegation was made at that time. Rather, the motion alleged that the adverse impact was counsel's failure to object to the prosecutor's summation and the failure to challenge the canine and forensic evidence. (R. 290) Defendant now seeks to improperly change his theory on adverse impact. This new theory

that the adverse impact was Carter's deficient performance at the penalty phase is an impermissible amendment of Defendant's claim. See *Griffin v. State*, 866 So. 2d 1 (Fla. 2003).

Clearly the original theory of adverse impact fails on two counts. First, counsel could have clearly stated objections to both the closing arguments and the canine evidence without incurring any expense. Second, it is clear from the record that it was Clinton Pitts, not Carter, who was primarily responsible for the guilt phase of the trial and would have, therefore, been the one to pose such objections or mount such challenges.

Even if the claim that it was the representation during the penalty phase that was adversely affected by the alleged conflict had been properly made, it fails nonetheless. As Defendant specifically highlights in his discussion of the adverse impact on Carter's representation, no evidentiary hearing was ordered with respect to the conflict claim. However, as Defendant now tries to allege that the adverse impact was the failures at the penalty phase, it is clear that the factual determinations to establish the failures complained of in that claim and those that would from the basis of Defendant's newly alleged adverse impact are one in the same. Defendant had in excess of three years from the time that the evidentiary hearing

on the alleged penalty phase failure was ordered and the hearing being held.

Defendant had a full opportunity to ask Mr. Carter questions regarding the basis of a number of the decisions on how to proceed at the penalty phase, including his motives for not calling a particular witness or another or for not seeking a mental health evaluation. Defendant did not ask a single open ended question of Mr. Carter that might have shed some light as to why he took these particular steps in the preparation of the penalty phase proceedings.

Defendant also claims that the alleged conflict caused Carter not to seek additional funds from the court for investigation of mitigation. It is unclear how such an expenditure, which would not financially benefit Carter himself, would cast any further suspicion on his billing practices. Nonetheless, at the evidentiary hearing on the alleged penalty phase failures, Defendant had a full opportunity to develop the factual allegation needed to establish this particular claim.

Defendant clearly fails to establish a plausible alternative defense strategy that was reasonable under the facts and that was not chosen as a result of the alleged conflict. Having failed to establish that either an actual conflict existed or how that conflict adversely affected counsel's

representation, the lower court properly summarily denied this claim.

III. THE LOWER COURT PROPERLY REJECTED THE CLAIM OF INNEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE.

Defendant contends that the lower court erred in denying his claim that his counsel was ineffective at the penalty phase of the trial for (i) failing to retain a mental health expert; (ii) failing to investigate and present key fact mitigation witnesses, namely two of Defendant's teachers and a work supervisor; (iii) failing to properly prepare those mitigation witnesses who were presented; (iv) failing to object to the aggravating factor of "under sentence of imprisonment;" (v) failing to ensure that the jury was properly instructed on Defendant's ineligibility for parole if sentenced to life; (vi) preparing a deficient sentencing memo; (vii) failing to present further mitigation evidence at the *Spencer* hearing; and (viii) failing to object when the court allegedly adopted the State's sentencing memorandum.

All of these claims were first brought forward in an amended motion. None was previously asserted in the original motion to vacate. They are not amplifications or clarifications of arguments previously asserted, nor are they predicated on

information newly obtained by virtue of public records disclosures. There being no reason why these claims should not have been brought in the initial motion. The lower court properly denied 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. The remainder of the claims should have, likewise, been dismissed as untimely by the lower court. *McConn v. State*, 708 So. 2d 308 (Fla. 1998).

Nonetheless, the lower court ordered an evidentiary hearing on three issues: "1) [f]ailure to investigate and present mitigation evidence, 2) [f]ailure to retain a mental health expert and timely obtain other witnesses, [and] 3) [f]ailure to allege to the jury that if defendant were sentenced to life, he would allegedly never be eligible for parole." (R. 388) After the evidentiary hearing, the court denied all remaining claims, finding that none of the testimony at the evidentiary hearing established either that counsel's performance was deficient or the requisite prejudice under *Strickland*. The court also stated it would not consider the claim alleging that the State had authored the trial court's sentencing order, as it was beyond the scope of the court's earlier order, and was unsupported by any evidence. At that time, the court also granted the State's

renewed motion to preclude the testimony of the expert on the defense of capital cases. The court's denial of the claims is amply supported by competent and substantial evidence adduced at the evidentiary hearing. The court's findings should, therefore, be affirmed. *Stephens v. State,* 748 So. 2d 1028 (Fla. 1999).

A. ABSENCE OF MENTAL HEALTH MITIGATION EVIDENCE

Defendant first asserts that his trial counsel was ineffective for failing to retain and present a mental health expert to testify at the penalty phase of his trial. The lower court rejected this claim stating:

> No where in this record is there any suggestion calling for a mental evaluation. Because one is now available does not establish that there was a lack of diligence on the part of trial counsel.

(R. 928) (citing *Davis v. Singletary,* 119 F.3d 1471 (11th Cir. 1997)).

In reviewing these findings, this Court is required to accept the lower court's factual findings to the extent that they are supported by competent, substantial evidence. *Stephens,* 748 So. 2d at 1033-34. However, this Court may independently review the lower court's determination of whether those facts support a finding of deficiency and prejudice to support a holding that counsel was not ineffective. *Id.*

Florida Courts have often repeated the observation of the Supreme Court of the United States in *Ake v. Oklahoma*, 470 U.S. 68, 82 (1985), that Adefendant=s mental condition is not necessarily at issue in every criminal proceeding.@ *Mills v. Moore*, 786 So. 2d 532 (Fla. 2001); *Lopez v. Singletary*, 634 So. 2d 1054 (Fla. 1993); *Mills v. State*, 603 So. 2d 482 (Fla. 1992); *Bertolotti v. State*, 534 So. 2d 386 (Fla. 1988); *Blanco v. State*, 507 So. 2d 1377 (Fla. 1987); *Bush v. Wainwright*, 505 So. 2d 409 (Fla. 1987) *Clark v. State*, 467 So. 2d 699 (Fla. 1985). Hence, where there is nothing in the record calling a defendant=s mental health into question or alerting counsel or the court of the need for a mental health evaluation, counsel will not be held ineffective in failing to investigate further. *Melendez v. State*, 612 So. 2d 1366 (Fla. 1992); *see also Williams v. Head*, 185 F.3d 1223 (11th Cir. 1999); *Baldwin v. Johnson*, 152 F.3d 1304 (11th Cir. 1998).

At the evidentiary hearing, trial counsel Arthur Carter testified that, in neither his interview of Defendant nor those of several of Defendant’s family members, was there ever any mention of any behavior that would lead anyone to conclude that Defendant had any psychological issues. (R. 1226) On the contrary, each one of Defendant’s sisters, his mother, his friend, the mother of two of his four children, and Defendant

himself, all of whom were interviewed by defense investigator Geller, and subsequently testified at the penalty phase, consistently stated that Defendant had a good upbringing; that he was never involved in fights; that he was never expelled from school; that he had never abused drugs or alcohol; and that he was a loving and caring father, all of which tend to negate the existence of a personality disorder. (R. 1229; DAT. 1497-1535; DX C)

The report prepared by investigator Geller, which Defendant introduced at the evidentiary hearing, contains summaries of the interviews he conducted with Defendant, his mother, his three sisters, one of the mothers of his children, two of his best friends and his former babysitter. Each and every one of the summaries states that the individual interviewed stated, in one way or another, that Defendant had enjoyed a normal childhood and upbringing. (DX C CP3355-81) They all consistently reported that Defendant had never abused alcohol or drugs; that Defendant had been an average student; and that he was not a violent person. *Id.* As is detailed in the investigator's invoice at the end of the report, some of the interviews were rather lengthy. Geller reported spending three hours interviewing Defendant's mother and a total of four hours interviewing his three sisters. (DX C) Despite the fact that the subjects of family life and

Defendant's upbringing were clearly discussed during these interviews, not one of the nine individuals interviewed ever mentioned any incident of violence in the Sims household.

The summary of Defendant's interview further highlighted the absence of any evidence suggesting a mental evaluation was appropriate. Geller reported interviewing Defendant for a total of four hours, over a period of three days. (DX C) The summary of the information gleaned from those interviews extends five pages. These facts alone suggest that Defendant was candid and forthcoming about providing the investigator with information. In fact, the report states that Defendant specifically stated to Geller that he had never been beaten or abused by his parents; that he had an adequate upbringing; and that he had never observed any violence between his parents or between his parents and siblings. (DX C CP3355)

Furthermore, Defendant's own mental health expert, Dr. Charles Golden, testified that, in reviewing the materials pertaining to the case, he read several depositions of Defendant's family members taken at the time of trial. He stated that, in those depositions, the individuals were specifically asked about physical abuse and related subjects, and that each denied anything of a sort ever occurred in the Sims household. He agrees that, at the time, they consistently

reported a happy and normal family life. (R. 1045-46) Furthermore, in his own interview of Defendant, Dr. Golden is told by Defendant that his family had nothing to do with what he had done. (R. 1046)

Under very similar facts, this Court has previously found that trial counsel was not ineffective for failing to uncover a defendant's abusive upbringing claimed in a post conviction motion, where there was testimony at the time of trial from the defendant and his mother that the defendant had been a carefree child who had enjoyed a normal childhood. *Correll v. Dugger*, 558 So. 2d 422, 426, n.3 (Fla. 1990). In that case, the defendant had testified at the time of trial that he was close to and loved his father but later claimed that his deceased father had been abusive. This Court found that "given the fact that diametrically opposite testimony was given by [defendant] and his mother," trial counsel could not be deemed ineffective for failing to delve deeply enough into the defendant's family history. *Id*

Defendant specifically contends that counsel should have gleaned from the fact that Defendant was struck by a car at a very young age that a mental health examination was appropriate, because it alerted to the possibility of brain damage. However, all the evidence available to counsel at the time of trial

points to the absence of such injury. Hospital records relating to that incident were sought and obtained. The records indicate that there was no loss of consciousness and that the child's pupils were equal and reactive to light (DX C CP3347), both of which negate the presence of injury to the brain. The other injuries reported by Defendant were clearly not serious enough to require medical attention. Furthermore, as Carter testified, in none of the interviews, by either himself or Geller, of Defendant, his family members, or his childhood friend, was there ever a mention of behavioral changes following any of the injuries. (R. 1229)

Defendant also asserts that the reported difficulty Defendant experienced in coping with the death of his father should have alerted counsel that a mental health examination was in order. Although it is true that Defendant's father's passing was repeatedly mentioned by those friends and family members interviewed as a particularly difficult time for Defendant, it hardly follows that being devastated over the death of one's father is indication of the presence of mental health issues. Grief is a normal emotion universally experienced by well adjusted individuals. One can more easily see how the absence of such emotion might be much more indicative of mental illness.

Defendant also suggests that the fact that Carter argued to the jury that Defendant acted under extreme duress at the time he killed Officer Stafford indicates that he should have sought a mental health evaluation to support that theory. It is clear from the record that counsel was putting forth the theory that the Officer's alleged threats to Defendant and physical force allegedly used on Defendant amounted to duress. (DAT. 1588-89) Carter was not arguing that Defendant was somehow particularly susceptible to such a threat, as Dr. Golden now suggests, but rather that anyone in that position would have felt under duress. As Carter testified at the evidentiary hearing, this is a fact to which the Defendant himself could testify. (R. 1210)

Defendant further states that the court failed to make findings of fact in support of its assertion that there was nothing in the record to support the conclusion that a psychological evaluation was warranted. Logically one cannot point to the absence of something except to say that there is such an absence. Defendant cannot blame the court for his own failure to make more specific allegations as to counsel's alleged failures.

In *Ragsdale v. State*, 720 So. 2d 203 (Fla. 1998), this Court articulated that, effective counsel must make *reasonable* investigation into mitigation evidence as counsel cannot claim

to have made a tactical decision not to present certain evidence or that the evidence was not available if it was never even sought. In *Ragsdale*, this Court found that trial counsel had been ineffective for failing to investigate and present a multitude of mitigation evidence including mental health evidence. In that case, counsel presented only one witness at the penalty phase. At the post conviction hearing, numerous witnesses were called to establish all the mitigation testimony that would have been available at the time of trial had counsel conducted a reasonable investigation. There was testimony that trial counsel had never even contacted all but one of the defendant's siblings. There was also testimony that, had those siblings been contacted, counsel would have learned of the defendant's head injuries, which were immediately followed by certain behavioral changes, as well as the defendant's abusive childhood environment, all of which clearly indicated the need for a mental health evaluation.

The facts in *Ragsdale* are diametrically opposite to the ones in this case. The testimony at the evidentiary hearing shows that Mr. Carter clearly made all reasonable efforts to seek mitigation evidence, and there simply was no indication that Defendant suffered any mental condition that might be uncovered by a mental health examination. As detailed above,

the evidence at the evidentiary hearing established that co-counsel, Clinton Pitts, hired an investigator who conducted an extensive search for mitigation evidence, including conducting interviews with Defendant's friends and family, and even his former babysitter. Medical, school and employment records were sought, obtained and reviewed. The investigator also reviewed discovery materials for additional mitigation evidence. None of these efforts revealed any evidence calling for a mental health evaluation. But here, unlike in *Ragsdale*, the investigation was conducted. The witnesses were sought and, for the most part, found and interviewed, in some cases for hours.

At the evidentiary hearing, Defendant failed to present a single witness who was not interviewed by either Geller or Carter who would have revealed some crucial information that would have hinted that a psychological evaluation was appropriate. The only testimony presented at the evidentiary hearing to support the alleged insufficiency of counsel in failing to obtain such evaluation was Dr. Golden's opinion, based solely on a review of the documentary evidence, that the interviews conducted by the investigator were insufficient. Although this testimony was not objected to, an opinion as to what is sufficient mitigation investigation is clearly beyond the scope of Dr. Golden's expertise as a psychologist.

Furthermore, the excluded testimony of Steven Potolsky was also elicited to establish that the mitigation investigation was under par. This opinion was also based solely on a review of the materials, as Potolsky admitted on cross examination that he never consulted with Mr. Carter regarding his preparation of the penalty phase. The suggestion from both of these opinions is that Carter's deficiency was not further interviewing these nine individuals, and that more discussions with them would have led to a discovery of the Sims' abusive household.

Defendant failed to establish how, given that Carter was presented with consistent versions of Defendant's upbringing by nine separate witnesses, a reasonable attorney would have concluded that further interviewing these witnesses was necessary. All nine witnesses, which includes Defendant himself, had first hand knowledge of Defendant's childhood and family life. The summaries of the interviews reveal that the subjects of family life, quality of upbringing, and the absence of any other problematic behavior were addressed.

Even if one were to believe that counsel should have discounted the family's version of their normal family, as they might be reluctant to admit to the history of violence, there is no reasonable explanation as to why the babysitter, girlfriend and two best friends would be, likewise, inclined to hide this

fact. In explaining the family's denial of the abuse at the depositions taken at the time of trial, Dr. Golden specifically testified that abuse victims are often reluctant to discuss the abuse. (R. 1048) This does not explain why individuals, who would have been in a position to observe the dynamics of the household, but who were not victims of the abuse themselves, would consistently report the absence of such abuse.

Furthermore, aside from Dr. Golden's testimony that the family members subsequently and reluctantly recounted to him facts regarding the abusive environment in which Defendant grew up, Defendant failed to establish that, at the time of trial, these witnesses would have shared that information with counsel, had counsel done something differently. None of the family members were called to testify at the evidentiary hearing as to why they failed to mention any of these facts to either Geller or Carter, or how they would have done so under different circumstances.

Furthermore, Defendant failed to establish how Dr. Golden's testimony diagnosing Defendant as having Personality Disorder N.O.S. would have outweighed the significant aggravating evidence presented in this case. Therefore, there is no reasonable probability that, had this mitigation evidence been

presented, the outcome of the penalty phase proceeding would have been different.

Accordingly, there was ample competent evidence to support the trial court's finding that counsel's performance was not deficient in failing to retain a mental health expert, as none of the evidence available at the time of the trial indicated a need for such an evaluation. Therefore, the lower court's denial of this claim should be affirmed. *Stephens*.

B. COUNSEL'S FAILURE TO INVESTIGATE AND PRESENT KEY FACT WITNESSES AND INSUFFICIENT PREPARATION OF THE MITIGATION WITNESSES PRESENTED

Defendant next asserts that his trial counsel was ineffective for failing to investigate and call what he terms "key fact witnesses," namely two of Defendant's school teachers and a work supervisor, and for failing to adequately prepare the fact witnesses who did testify at the penalty phase. After hearing the testimony from these witnesses at the evidentiary hearing, the lower court found that:

> No witness had knowledge of the defendant's conduct after he had left the company at which he worked in the late 80's, did not know about the defendant's prior robbery and could not shed any insight in the 6 to 12 years presiding (sic) this shooting. In comparing what was shown at trial and what was presented at the post trial hearing, it is obvious that there is little between them to show requisite prejudice under Strickland, supra."

(R. 928) These findings are supported by competent and substantial evidence and should, therefore, be affirmed. *Stephens*.

At the evidentiary hearing, Defendant attempted to establish that Carter's efforts with regard to investigating mitigation evidence were inadequate, by suggesting that Carter had never had any conversations with Geller before or after the investigation materials were prepared. This is simply not supported by the record. Not only did Carter testify that it was Clinton Pitts, his co-counsel, who had hired Geller, but Geller's invoice, which is part of the exhibit Defendant introduced into evidence at the hearing, reflects five hours of Geller's time were spent in conferences with the law office. (DX C)

Defendant also argues that Geller stopped investigating further into mitigation evidence as soon as the 1,000 dollar allocation had been exhausted. His own exhibit shows the contrary. The letter preceding the invoice accompanying said report clearly states that the invoice does not reflect all the hours spent, clearly establishing that Geller felt free to do work beyond the allotted amount.

Defendant further suggested that Carter's failure to request follow-up on certain efforts by Geller, which were not

successful, fell below the standard of reasonably effective counsel. The first of these failures refers to the medical records of Miami Christian Hospital, where Defendant was born, which no longer existed at the time of trial. In light of Defendant's statement that he had not sought medical attention except for the head injury as an infant at Jackson Memorial, and for a burn at Hialeah Hospital, this record, had it been found, would have established that Defendant was born.

Defendant also suggested during his questioning of Carter, that his failure to request Geller make further attempts to locate certain former owners and employees of Tier Construction or of Buntain Construction was unreasonable. As stated by Defendant himself, Tier Construction was no longer in business at the time of the trial. There is no evidence that Defendant provided any contact information for any of the individuals listed in the Geller report or that further attempts would have been fruitful. Geller reported placing telephone calls to the owner of Buntain Construction, who did not return the calls. Defendant failed to establish how further calls to an unresponsive individual would have helped, or what his testimony might have been.

The only affirmative mitigation evidence presented at the post-conviction evidentiary hearing that might have been

available to counsel at the time of trial, and which was not presented during the penalty phase, was the testimony of two of Defendant's grade school teachers and a former work supervisor. Timmie Terry, Defendant's sixth grade teacher and Mrs. Rosylen Cox, who also taught Defendant while he was in elementary school, were called to testify at the evidentiary hearing. Their testimony essentially established that Defendant had been a well behaved child who did not get into trouble at school. Defendant failed to establish that failing to call witnesses who could only testify to Defendant's character as a child falls below the standard of reasonably competent counsel. In fact, as was brought out during the cross examination of Mr. Carter, it can be argued that presenting such evidence would be risky, as a jury could conclude that the presentation of such remote evidence highlights the lack of similar testimony regarding Defendant's more recent history. Furthermore, it was not necessary to resort to such possibly harmful tactic of eliciting such remote evidence, in light of the much more relevant testimony of Defendant's mother, sisters, friend, girlfriend and pastor. *Valle v. State*, 705 So. 2d 1331, 1334-35 (Fla. 1997); *Breedlove v. State*, 692 So. 2d 874 (Fla. 1997).

Furthermore, there was no prejudice to Defendant in failing to elicit the testimony of these individuals as there was

testimony presented from four separate witnesses that Defendant was a good child, who was never expelled from school, and who did not have any problems in childhood or while attending elementary school (DAT. 1502, 1515, 1518, 1521, 1527). This period of Defendant's life was discussed repeatedly throughout the penalty phase proceeding. Therefore, there is no reasonable probability that further evidence of Defendant's good behavior as a child would have resulted in a life sentence. *Valle.*

Defendant similarly contends that counsel's failure to secure the testimony of Defendant's former supervisor at Tier Construction, Mr. Stanley Earl Thomas, constituted ineffective assistance of counsel. Mr. Thomas' testimony essentially established that Defendant was a good person who worked hard, got along with co-workers and did not get into fights. Mr. Thomas also admitted he had very little contact with Defendant in recent years, did not know of Defendant's prior troubles with the law or of the existence of three of Defendant's four children. Defendant failed to establish that the failure to elicit this testimony was unreasonable in light of the fact that, as set forth above, and as is undisputed, the company no longer existed at the time of trial, and efforts were made to find individuals formerly employed there. Reasonable counsel is

not required to do all possible investigation, only what is reasonable. *Strickland*, 466 U.S. 668.

Finally, Defendant's suggestion that neither Carter nor Geller conducted any mitigation investigation outside of what was reported on the Geller report is false. As evidenced by the report, at the time of its preparation, Geller had not been able to contact Reverend Johnny Cooper. Yet, this individual testified at the penalty phase. Clearly someone made efforts to locate this witness and secure his presence at the penalty phase proceeding. Had Defendant asked questions designed to reveal the true efforts made in securing mitigation evidence, rather than posing pointed question after pointed question at the evidentiary hearing, the record might be clearer on these points. *See Smith V. State*, 445 So. 2d 323 (Fla. 1983).

Furthermore, Defendant failed to establish prejudice. There was testimony relating to Defendant's employment from other witnesses. Defendant's sister not only testified that Defendant worked at a McDonald's during high school, but she also stated that he worked following graduation. (DAT. 1517) Furthermore, Carter specifically highlighted Defendant's work history during his penalty phase summation. (DAT. 1587-88) As he correctly pointed out in that argument, the jury had heard testimony from Defendant himself during the guilt phase with

respect to his employment history. In fact, Defendant had testified to working for a Miami newspaper prior to high school, and working at a McDonald's and as a stock boy while in high school. (DAT. 1225) Accordingly, there is no reasonable probability that further evidence of Defendant's employment history would have resulted in the jury recommending life. *Valle*.

Defendant next asserts that counsel was ineffective in failing to adequately prepare witnesses who did testify at the penalty phase, specifically, Reverend Cooper, Defendant's mother and Defendant's sisters, because counsel allegedly only talked to them by telephone and/or for approximately five minutes in the hallway prior to their testimony. Once again the record does not support Defendant's allegations. First, in response to whether Carter had a substantive conversation with Defendant's mother prior to the day of the penalty phase, Carter explained that she did not even want to come at all. (R. 1199). The fact that she did eventually testify is evidence of Carter's zealous and effective advocacy. *See Hodges v. State*, 885 So. 2d 338 (Fla. 2003). To suggest that counsel was ineffective for failing to prepare a reluctant witness is to require more than what is reasonable under the circumstances. Second, as to Defendant's sisters, Carter initially testified that he had spoken to them

by telephone prior to the day of the proceeding, but later stated that he did not have a present recollection as to having done so. Merely because the witness does not remember having the discussion does not establish that it did not occur. Furthermore, Defendant failed to call any of these witnesses at the evidentiary hearing to establish what, if any, information would have been testified to by them had they been prepared for a more extensive period of time. *Smith*.

The only specific allegation Defendant makes in his brief regarding what Carter might have done differently had he prepared better, was to state that he should not have elicited from Defendant's friend that Defendant had used drugs and had been in a fight in high school. No testimony was elicited in support of this allegation. There is no evidence that further preparation would have prevented this response from the witness or that not hearing this response would have resulted in a different recommendation by the jury. *Smith*.

Defendant further argues that counsel was ineffective for eliciting the witnesses' views on the death penalty and that they did not think Defendant deserved the death penalty because he had acted in self-defense, a theory which the jury had clearly rejected. Once again, no testimony was elicited as to this fact, and Defendant failed to establish that it was an

unreasonable strategic choice or that prejudice was suffered from it. *Smith*.

In light of the abundant evidence establishing the efforts made in securing mitigation witnesses; the fact that nine witnesses testified at the penalty phase; the minimal and remote evidence of additional mitigation witnesses presented at the evidentiary hearing; and the absence of prejudice as evidence of Defendant's good behavior in elementary school and employment history was introduced through other witnesses, there was ample evidence to support the lower court's findings. Their denial of this claim should, therefore, be affirmed. *Stephens*, supra.

C. FAILURE TO OBJECT TO AGGRAVATING FACTOR

Defendant next contends that trial counsel was ineffective for failing to object to the trial court's adoption of the State's proposed aggravator of "under sentence of imprisonment," given that Defendant was on controlled release at the time of the murder. All the facts underlying this claim were known at the time Defendant's direct appeal was filed. No facts are alleged in support of why this claim could not have been raised at the time. This claim was not even raised on Defendant's original motion to vacate, but rather, it was raised for the first time in an untimely amended motion. It is for that reason

that the lower court summarily denied it. *Moore v. State*, 820 So. 2d 199 (Fla. 2002). The claim is procedurally barred and the lower court's summary denial was proper.

Moreover, as Defendant correctly points out, this Court decided in *Davis v. State*, 698 So.2d 1182 (Fla. 1997) that controlled release constitutes a "sentence of imprisonment." The mere fact that the claim could have been made, because the issue had not yet been decided at the time, does not change the fact that the claim would have been meritless. *Lockhart v. Fretwell*, 506 U.S. 364 (1993). It is well settled that counsel cannot be deemed ineffective for failing to raise a meritless claim. *Kokal v. Dugger*, supra. This claim is, therefore, facially insufficient.

D. JURY INSTRUCTION ON PAROLE ELIGIBILITY

Defendant next asserts that trial counsel failed to ensure that the jury was properly instructed on Defendant's ineligibility for parole. As with the claim above, this claim is also based on facts, all of which were known at the time Defendant's direct appeal was filed. This Court has "consistently recognized that 'allegations of ineffective assistance of counsel cannot be used to circumvent the rule that post-conviction proceedings cannot serve as a second appeal'"

Cherry v. State, supra. There being no reason why this claim could not have been brought then, this claim is procedurally barred.

The lower court, nonetheless, ordered an evidentiary hearing on this issue. The only evidence elicited at the hearing with regard to this issue was the testimony, which was later excluded, of Steven Potolsky, that the failure of trial counsel to take further steps to ensure the jury was not confused was unreasonable. The lower court found that "the jury was unambiguously instructed that life in imprisonment was without parole." (R. 929) This court must give deference to the lower courts factual finding as it is clearly supported by competent and substantial evidence. *Stephens*. Moreover, the claim was properly denied as Defendant did not carry his burden. *Smith*.

Although it is clear from the record that during the guilt phase of the trial, 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 (DAT. 1444, 1471), it is also clear that this mistake was corrected during the penalty phase, when the sentence was clearly the pivotal issue. Moreover, during his summation at the penalty phase, counsel repeatedly highlighted that a recommendation of life meant life without parole. (T. 1584-85)

Furthermore, it is clear that the court also instructed the jury properly at the conclusion of the penalty phase. (T. 1598-99) Defendant failed to establish that, in light of these efforts, by both counsel and the court, to rectify the earlier misstatements, counsel's actions were unreasonable.

Defendant contends that because the jury instructions on the record do not show the correction the court had stated it would make on the written jury instruction that was sent to the jury into the deliberation room, that no such correction was in fact made. The existence of this version of the written jury instruction in the record does not establish that the uncorrected version is the one that made it into the jury room. In fact, the court's statement immediately following the jury retiring to deliberate establishes the contrary. The court stated: "[i]f you will look on the last page of the jury instructions, I changed the verdict to erase the 25-year portion. So with that, I am going to send them back."

There being substantial and competent evidence to support the lower court's finding that the jury was unambiguously instructed on the issue, that court's denial of this claim was proper and should, therefore, be affirmed.

E. COUNSEL FAILURES AT THE *SPENCER* HEARING AND ON THE SENTENCING MEMORANDUM

Defendant claims that trial counsel was ineffective because he presented no additional witnesses at the *Spencer* hearing and made no further arguments to the court, other than correcting the court's misimpression that Defendant was twenty-five years old at the time of the offense. Defendant makes no allegation, whatsoever, as to what further evidence trial counsel should have presented at that time. *Ragsdale*. Furthermore, the only evidence introduced at the evidentiary hearing in support of this claim was the opinion of Steven Potolsky, that Carter's performance in this respect was deficient and that, in light of the jury's recommendation "something" needed to be done to spare his client from a death sentence. (R. 1344-45) When questioned with respect to having had the opportunity to present further evidence to the court in support of a life sentence, Mr. Carter testified that he felt the sentencing memorandum was a sufficient way to do so (R. 1203-04). As no evidence was presented in support of this claim, it was properly denied. *Smith*.

Defendant also contends that the sentencing memorandum prepared by Mr. Carter was deficient but, again, fails to make factual allegations as to what should have been included in such document that would have created a reasonable probability of a

different outcome. *Ragsdale*. Defendant complains that there are typographical and grammatical errors and that the memorandum fails to support its assertions with references to the facts of the case. As Carter testified at the evidentiary hearing, in light of the fact that the trial judge had alertly sat through the entire proceeding, and was fully aware of the evidence counsel had presented in support of the arguments laid out on the memo, it would have been duplicitous to reassert all the facts and circumstances surrounding each factor listed in support of a life sentence. (R. 1235-36)

As Defendant failed to establish what additional evidence reasonably competent counsel should have presented at the *Spencer* hearing; how it was unreasonable not to make further arguments to the court; or how such further arguments would create a reasonable probability that the court would have departed from the jury's recommendation, the lower court's denial of this claim should be affirmed. *Smith*.

Defendant also argues that counsel was ineffective by putting forth two theories of mitigating factors, namely that Defendant was devastated by the death of his father and that his crime was one of reaction, not premeditation, without supporting said claims with mental health expert evidence. It should be noted that this theory was not presented in the Amended Motion.

Griffin. Nonetheless, this claim merely rehashes Defendant's claim that counsel should have retained a mental health expert. As was discussed at length above, Defendant failed to establish that counsel's failure to retain a mental health expert was unreasonable under the circumstances. Here, Defendant also fails to establish prejudice, in this case as it pertains to his failure to present such evidence to the judge following the jury's recommendation. Furthermore, a court does not necessarily need a mental health expert to properly weigh the fact that Defendant was devastated by his father's death. There was testimony on the record with regard to that fact from Defendant's sisters (DAT. 1516, 1523). Neither does the court need a mental health expert to consider the argument that Defendant's crime was a result of his fear and not an act of premeditation. Defendant's own testimony was sufficient to support this factor. Both of these factors could be properly weighed by the trial court without the assistance of an expert, and Defendant has failed to show otherwise. *See Mills v. Moore*, 786 So. 2d 532 (Fla. 2001); *Lopez v. Singletary*, 634 So. 2d 1054 (Fla. 1993); *Mills v. State*, 603 So. 2d 482 (Fla. 1992); *Bertolotti v. State*, 534 So. 2d 386 (Fla. 1988); *Blanco v. State*, 507 So. 2d 1377 (Fla. 1987); *Bush v. Wainwright*, 505 So. 2d 409 (Fla. 1987) *Clark v. State*, 467 So. 2d 699 (Fla. 1985).

Defendant also puts forth in his brief another argument not previously stated in the amended motion, namely that counsel was deficient in failing to enumerate in the sentencing memo evidence of Defendant's work history beyond his employment while in high school. Like the claim regarding mental health evidence, this claim merely rehashes a claim already discussed in another form. As was detailed in the discussion of that claim, counsel did put forth evidence of Defendant's other work history in his presentation to the jury. Clearly the judge presiding over the proceedings was aware of this evidence. Furthermore, the additional evidence of Defendant's work history presented at the evidentiary hearing was found by the lower court to be insufficient to establish the requisite *Strickland* prejudice. Whether one specific instance of employment or another was included in the memorandum to illustrate Defendant's good work history, the record supports that the court was fully aware of this fact, and properly considered it. There is no reasonable probability that such further emphasis on evidence that had already been heard by the court, or even the additional evidence presented at the post-conviction hearing, would have led the court to deviate from the jury's recommendation in light of the abundance of aggravating factors presented. *Valle*.

Defendant failed to establish that counsel's performance at the *Spencer* hearing or in his preparation of the sentencing memorandum was deficient. He further failed to establish what evidence reasonably effective counsel would have presented, or how any such evidence would create a reasonable probability of a different result. Accordingly, the trial court's denial of this claim was proper and should, therefore, be affirmed.

F. FAILURE TO OBJECT WHEN COURT ALLEGEDLY ADOPTS STATE'S SENTENCING MEMORANDUM

Defendant finally claims trial counsel was ineffective for failing to object when the trial court adopted what Defendant claims is a sentencing memorandum prepared by the State. The lower court refused to consider this claim stating that it had no evidence to support it. (R. 926).

All the facts underlying this claim were known at the time Defendant's direct appeal was filed. No facts are alleged in support of why this claim could not have been raised at that time. This claim was not even raised on Defendant's original motion to vacate, but rather, it was raised for the first time in an untimely amended motion, which did not allege why the claim could not have been brought earlier. *Moore*, *Cherry*. The claim is procedurally barred and the lower court's summary denial was proper.

Even if it were not procedurally barred, Defendant's claim is meritless. Defendant's entire allegation rests on the fact that the court's sentencing order is captioned "sentencing memorandum;" that it bears a manually corrected date stamp; and on the presence of a blank, manually filled in, with respect to the sentence for Count II. These characteristics on the face of the documents, Defendant alleges, are proof that the State prepared the document. As the lower court stated, there is no evidence to support this claim. The lower court's denial of the claim was proper and should be affirmed.

IV. THE LOWER COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING THE TESTIMONY OF DEFENSE EXPERT ON INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant asserts that the lower court erred in excluding the testimony of Steven Potolsky, an expert witness on the issue of ineffective assistance of counsel in capital cases, at the evidentiary hearing. The lower court properly exercised its discretion in excluding evidence that it did not find helpful as the trier of fact. This claim should, therefore, be denied.

After a deposition of Mr. Potolsky was taken, the State moved to exclude his testimony on the basis that the substance of the testimony was not one beyond the common understanding of the trier of fact, as it was obvious from the deposition that

Mr. Potolsky's testimony was limited to giving legal opinions on ineffectiveness of counsel. The lower court initially denied this motion, and the testimony was heard.

After being qualified as an expert on the defense of capital cases and explaining what materials he reviewed in this case in rendering an opinion as to the quality of representation, Steven Potolsky testified that, in his expert opinion, as it relates to the penalty phase of the trial, counsel's performance at said proceeding fell below an objective standard of reasonableness for counsel in a death penalty case. (R. 1299) He also concluded that there is a reasonable probability that the outcome would have been different but for counsel's lacking representation. *Id.* Although this opinion was heard without an objection, it encompasses the two ultimate issues to be decided by the court at the hearing.

Mr. Potolsky went on to give a number of opinions predicated on hypotheticals that did not reflect the evidence presented. It should be noted that Mr. Carter had already testified at the time Defendant called Mr. Potolsky to testify. One such question was whether it would be problematic if the testimony at the evidentiary hearing had been that neither Mr. Carter nor Mr. Pitts had ever had a conversation with investigator Geller prior to the completion of his

investigation. (R. 1310-11) The testimony pertaining to this point merely established that Carter had not had such a conversation with Geller and that it had been Pitts who had hired him. Furthermore, Defendant's own exhibit indicates that Geller had spent at least five hours in conferences with the law office on five separate dates. (DX C) Defendant never asked the logical question whether Mr. Pitts had had such a conversation with Geller or why Carter had not.

Potolsky went on to opine that if the testimony at the evidentiary hearing established that the Geller report was the only mitigation investigation conducted in preparation for the penalty phase, this would fall short of the standards of reasonable performance in a capital case. (R. 1311) This opinion is, again, irrelevant, as it does not reflect the evidence in the case. The testimony of Mr. Carter clearly established he traveled to California to investigate possibly helpful evidence. He further testified to several interviews with Defendant, his friend, his pastor and his family members including his mother and three sisters. The opinions rendered by Potolsky based on misstatements of the evidence are irrelevant and serve to highlight why the testimony was not useful to the court.

Potolsky went on to state that Carter's failure to request any follow-up investigation from Geller fell below standard

absent a valid strategic reason and that counsel's performance in the case was consistent with someone who was concerned about the County investigating his billing practices. (R. 1312-13) Mr. Potolsky rendered all of these opinions despite admitting that he never contacted Carter or Pitts, despite having had the opportunity to do so, to discuss any of the decisions made in the case.

Potolsky further enumerated the actions that he specifically thought were required of reasonable counsel in this trial such as: establishing better rapport with the family members so as to gain their trust and reduce their distrust of the criminal justice system; following up on the indications of good employment history; and further following up on Defendant's history of head injuries.

He further stated that a reasonably effective lawyer would have gleaned from the Defendant's troubles with the law following the death of his father, which were a deviation from his prior conduct as a mild mannered, non-aggressive, well behaved young man, that a mental health evaluation was necessary. (R. 1318) He stated that Mr. Carter did not adequately investigate or present evidence of Defendant's employment history but that he could not opine as to whether that omission constituted prejudice under *Strickland*. (R. 1326-

27) He further assessed that Carter's performance in front of the jury appeared to be unprepared; that he failed to elicit compelling testimony from Defendant's friend and family; and that it was ill advised to ask the family members their views on the death penalty in general.

He also opined that given the instructions given to the jury regarding the eligibility of parole after a life sentence, there was a serious risk of jury confusion on that issue (R. 1342); that the sentencing memorandum submitted by Mr. Carter was deficient because it was inartfully worded and contained typographical errors; and that his *Spencer* hearing presentation was inadequate; but he did not specify what should have been included in either the memo or the *Spencer* hearing presentation.

At the conclusion of the evidence the State renewed its motion to exclude this testimony. The court granted the renewed motion stating that:

> The testimony of Steven Potlosky (sic), Esquire did not relate to a subject which was beyond the understanding of the trier of fact is improper (sic). Indeed his opinion of whether prior counsel rendered effective assistance at trial is improper. Moreover, the question of effective assistance is a question of law to be applied to the facts of this case and not subject to testimony pro or con.

(R. 927) (citing *Freund v. Butterworth*, 165 F. 3d at 863 (11th Cir. 1999).

The admissibility of evidence is within the sound discretion of the trial court, and the trial court's determination will not be disturbed on appellate review absent a clear abuse of that discretion. *Brooks v. State*, 2005 Fla. LEXIS 1339 (Fla. 2005) (citing *Ray v. State*, 755 So. 2d 604, 610 (Fla. 2000) and *Zack v. State*, 753 So. 2d 9, 25 (Fla. 2000)). The aid of an expert is appropriate when a trial court determines that the subject is beyond the common understanding of the trier of fact and that the testimony will aid the trier of fact. *Jones v. State*, 748 So. 2d 1012 (Fla. 1999).

As cited by the lower court in its order, in *Freund v. Butterworth*, the U.S. Court of Appeals for the Eleventh Circuit stated that "[p]ermitting 'expert' testimony to establish ineffective assistance is inconsistent with our recognition that the issue involved is a mixed question of law and fact that the court decides." *Freund*, 165 F.3d at 863. Defendant attempts to distinguish *Freund* by saying that in that case the issue was whether trial counsel's strategy was reasonable while Potolsky's testimony in this case was introduced to establish the prevailing professional norm in capital case at the time of the trial. Neither of these assertions is true. The expert witness in *Freund* "opined that the law firm's representation of [defendant] fell below the constitutional standard of effective

representation because it presented conflicts of interest with the law firm's prior representations of [the co-defendants]." *Id*. at 857. This is precisely the type of opinion rendered throughout Potolsky's entire testimony. Furthermore, even if the testimony had been restricted to a recitation of the professional norms at the time, these are still matters with which Judge Carney was very familiar and it was, therefore, entirely within his discretion to exclude the testimony.

In *McCarver v. Lee*, 221 F.3d 583 (4th Cir. 2000), in upholding the district court's denial of an evidentiary hearing, the U.S Court of Appeals for the Fourth Circuit stated that the defendant "has not explicated how the testimony of a 'legal expert' assessing trial counsel's performance would aid a federal court in this particular case in making the legal determination whether trial counsel was constitutionally ineffective." *Id.* at 598.

It should also be noted that several state courts have likewise upheld a lower court's decision not to allow the testimony of a legal expert on ineffectiveness. In *Commonwealth v. Peterkin*, 513 A.2d 373 (Pa. 1986), the Supreme Court of Pennsylvania upheld a lower court decision not to allow the testimony of a legal expert stating that:

> The situation in the instant case is atypical in that the finder of fact, the judge, was not a layman on the

> subject of trial strategies and evidentiary considerations. Indeed, a trial judge, worth his salt, would seem to require no experts to advise him on what a reasonably vigorous advocate would do in any case. The more, particularly in a case the facts and participants of which are known to him. Certainly the trial judge, himself immersed in the facts and circumstances of the very trial under scrutiny, is better able to determine from argument than an alleged expert on what a perfect trial ought to be. Should it prove helpful, however, to a trial judge to hear such testimony, he may, but he is not obliged.

Id. at 386; s*ee also Clemmons v. State*, 785 S.W.2d 524 (Mo. 1990)(upholding lower court's exclusion of expert attorney testimony); *State v. Ohler,* 366 N.W.2d 771 (Neb. 1985)(holding not error for lower court to exclude expert testimony on ineffectiveness); *Lytle v. Jordan*, 22 P.3d 666 (N.M. 2001) (stating it is superfluous for expert to advise court on application of law on ultimate issue of effectiveness); *State v. Moore*, 641 A.2d 268 (N.J. Super. Ct. 1994)(upholding denial of evidentiary hearing where the only proffered evidence was testimony of expert attorney witness).

Defendant cites *State v. Reichmann*, 777 So. 2d 342 (Fla. 2000), in support of his claim. In *Reichmann*, the lower court did allow the expert testimony of Mr. Potolsky. Thus, this Court was not called upon to rule on the propriety of such testimony. It does not follow that, because one court has admitted certain evidence, another court's exclusion of the same evidence amounts to an abuse of discretion, especially where the foundation for

the admissibility of the evidence is so fact specific, as is the case of expert testimony. In contrast to *Reichmann,* the trier of fact in this case was an extremely experienced judge who himself tried and certainly presided over numerous capital murder cases, including the one at issue.

In light of the superfluous nature of the testimony, the finding by the trial court that, having heard the testimony, it would not be helped by it, and the extensive experience of the trier of fact in matters relating to the trial of capital murder cases, the court did not abuse its discretion in excluding Defendant's expert witness.

V. DEFENDANT'S *RING* CLAIM SHOULD BE DENIED

Defendant argues that Florida's capital sentencing scheme is unconstitutional pursuant to the U.S. Supreme Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002) because under said scheme the trial judge, not the advisory jury, makes the findings of fact required to impose a death sentence and asks this Court to reconsider its prior ruling rejecting that argument. Both this Court and the United States Supreme Court have held that *Ring* does not apply retroactively to cases, such as this one, where the sentence was final before *Ring* was decided. *Schriro v. Summerlin*, 542 U.S. 348 (2004); *Johnson v.*

State, 904 So. 2d 400 (Fla. 2005). Moreover, this Court has repeatedly rejected *Ring* claims in cases where the death sentence was supported by the "prior violent felony" and the "during the course of a felony" aggravators. *Gamble v. State*, 877 So. 2d 706, 719 (Fla. 2004); *Jones v. State*, 855 So. 2d 611, 619 (Fla. 2003). As such, Defendant is entitled to no relief based on *Ring*. The claim was properly denied and should be affirmed.

CONCLUSION

For the foregoing reasons, the trial court's denial of the motion for post-conviction relief should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEE** was furnished by U.S. mail to **Scott D. Danzis**, Covington & Burling, 1330 Avenue of the Americas, New York, NY 10019, and **Benjamin S. Waxman**, Robbins, Tunkey, Ross, Amsel, Raben, Waxman & Eiglarsh, P.A., 2250 Southwest Third Avenue, 4th Floor, Miami, FL 33129, this 3rd day of October 2005.

_____
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is type in Courier New 12-point font.

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