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In the Supreme Court of Florida

PINKNEY CARTER,

Appellant,

v. CASE NO. SC13-1076

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, Pinkey Carter, the defendant in the trial court, will be referred to as appellant, the defendant or by his proper name. Appellee, the State of Florida, will be referred to as the State. Pursuant to Rule 9.210(b), Fla. R. App. P. (1997), this brief will refer to a volume according to its respective designation within the Index to the Record on Appeal. A citation to a volume will be followed by any appropriate page number within the volume. The symbol "IB" will refer to appellant's initial brief and will be followed by any appropriate page number. All double underlined emphasis is supplied.

STATEMENT OF THE CASE AND FACTS

This is the postconviction appeal in a capital case. Pinkney Carter was convicted of three counts of first-degree murder and was sentenced to death in two of those cases. The facts of this case as recited by the Florida Supreme Court in the direct appeal opinion are:

> Carter and Elizabeth Reed dated on and off for approximately four years, during which time Carter periodically lived with Reed and her four children. During the course of their relationship, Carter helped Reed purchase a house on Barkwood Drive in Jacksonville and assisted her financially when she fell behind on her mortgage payments. At one point in early 2002, Carter proposed marriage, and Reed accepted. However, the engagement was soon called off and Carter moved out. Yet, according to Carter, he and Reed continued to date and were intimate.
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> By the summer of 2002, Carter learned that Reed had been seeing Glenn Pafford, who managed the Publix Supermarket where she worked. Around this time, neighbors spotted Carter lurking suspiciously near Reed's home and noticed his red Dodge pickup truck in the neighborhood.
>
> On Sunday, July 21, 2002, Reed visited Carter's apartment, where he was staying with his mother and his brother. Carter testified that Reed gave him some of her prescription pills for depression, and the two made plans to meet on Tuesday night. When Reed did not show up, Carter drove by her house and saw Pafford's truck in her driveway. From there, Carter drove home and spent several hours thinking about his relationship with Reed. He took three of the antidepressant pills Reed had given him and drank four to five glasses of whiskey. Around 11:30 p.m., Carter telephoned Reed. Her fourteen-year-old son Richard answered and told Carter that Reed was not home.
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> In the predawn hours of the following day, Carter returned to Reed's home. He parked in her front yard, retrieved his loaded .22 caliber rifle from the back seat of his truck, and began walking toward the house.[1] As Carter approached Reed's

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[1] There was some dispute as to whether Carter procured his rifle from his mother's house the night of the murders or whether the rifle was already stored in his truck for some other reason. According to Carter, the rifle had been in the truck for approximately three weeks because he had been out at target practice in Callahan, Georgia, three weeks prior to the murders. However, Carter's brother, Steven Carter, testified that Carter

home, Pafford walked out and Reed stood in the doorway. Concealing his rifle at his side, Carter confronted the couple and asked why Reed was still seeing him if she was seeing Pafford. Pafford asked Reed if she was still seeing Carter, and Reed responded that she was not. Pafford then asked Reed if she wanted him to stay, but Reed said that she wanted both men to leave. Carter responded that he was not leaving until he got some answers. According to Carter, Reed opened the door wider, and the three entered and stood in Reed's living room.

Once inside, Carter yelled at Reed, "I can't believe you're going to lie straight to the man's face like that." Then, according to Carter, Reed noticed the gun concealed at his side and grabbed for it. Reed began struggling with Carter in an attempt to take the gun away from him. Carter's finger was on the trigger and Reed had both hands on the barrel. Hearing the commotion, Reed's eldest daughter, Courtney Smith, ran into the living room, saw the gun, and then ran back toward her room. At that moment, according to Carter, the gun discharged, shooting Smith once in the head. Carter testified that Reed immediately let go of the gun and screamed, "Oh my God, dial 911!" As Reed ran toward her daughter, Carter aimed and shot Reed twice in the head. Immediately thereafter, Carter turned toward Pafford, aimed, and shot him three times in the head. Carter then fled the premises. The noise of the gunshots woke Richard, who came from his bedroom to find Pafford and Reed dead and Smith critically injured. Smith later died from her injuries. Reed's two other children, Rebecca and Brian, ages eight and six respectively, were also home at the time of the shooting.

Following the murders, Carter drove to his brother's house where he wrote notes to his mother and his sister. He then drove to Valdosta, Georgia, stole a Georgia state license plate from his friend's vehicle and placed it on his red Dodge pickup truck. From there, Carter drove to Starr County, Texas, where he abandoned his truck on the bank of the Rio Grande and swam across, entering Mexico illegally. While swimming, Carter abandoned his rifle, which was later recovered by the Mission County, Texas, Fire Rescue dive team. Upon entering Mexico, Carter was detained by the Mexican Military Police but was later released. Carter then traveled to Central America before returning to the United States to find work. He worked in both Illinois and Kentucky under the aliases Chris Cruse and Rodney Vonthun. Then, on January 6, 2004, while working in Kentucky as a roofer, Carter was identified by the Kentucky State Police and arrested for the murders of Pafford, Reed, and Smith.

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normally kept his guns in the upstairs apartment where he lived with his mother and was not aware of Carter storing his rifle in his truck unless he was hunting.

On January 15, 2004, a grand jury indicted Carter for three counts of first-degree murder with a firearm. Following several continuances, a trial was conducted. By special verdict, the jury unanimously found Carter guilty of both premeditated and felony murder for each of the three killings. This special verdict also showed that the jury determined the murders were committed in the course of a burglary. In the penalty phase, the jury recommended death for the murder of Pafford by a vote of nine to three, death for the murder of Reed by a vote of eight to four, and life imprisonment for the murder of Smith.

In its sentencing order, the trial court followed the jury's recommendation and imposed a life sentence for the murder of Smith and death sentences for the murders of Pafford and Reed. The court found three statutory aggravators and assigned great weight to each: (1) that Carter was previously convicted of a capital offense (the other two contemporaneous murders); (2) that the murders were committed while engaged in the commission of a burglary; and (3) that the murders were cold, calculated, and premeditated (CCP). The court found no statutory mitigators and seventeen nonstatutory mitigators: (1) Carter was raised in a broken home; (2) Carter was an above-average achiever in high school and college; (3) Carter was president of a club that helped others at Oklahoma State University; (4) Carter had a distinguished military record in the United States Air Force for almost four years; (5) Carter was a good employee with supervising responsibilities and had a consistent work record from a young age; (6) Carter was a good son with the strength to reconcile with his father, who abandoned him; (7) Carter was a good brother who protected his sister during her early years; (8) Carter saved a child's life while working as a lifeguard; (9) Carter was a loyal friend who made friends easily; (10) Carter had a close relationship with his nephew, Jacob; (11) Carter worked for a living in Kentucky while avoiding the police; (12) Carter demonstrated potential to be a productive inmate while in Duval County Jail; (13) Carter had the support of family and friends; (14) society can be protected by life sentences without parole; (15) Carter offered to plead guilty for three consecutive life sentences; (16) Carter resisted adopting the racist traits of his father and has had positive race relations throughout his life; and (17) Carter had a good relationship with Reed and her children prior to the murders. The court accorded all of these nonstatutory mitigators “some” weight. Ultimately, the trial court found that the “aggravating circumstances in this case far outweigh[ed] the mitigating circumstances,” and that “any of the considered aggravating circumstances found in this case, standing alone, would be sufficient to outweigh the mitigation in total presented regarding the murders of Glenn Pafford and Elizabeth Reed.”

Carter v. State, 980 So.2d 473, 477-479 (Fla. 2008)(footnote included).

On appeal to the Florida Supreme Court, Carter raised seven issues: 1) the statute abolishing the defense of voluntary intoxication, section 775.051, Florida Statutes (2002), is unconstitutional; 2) the trial court erred in finding the burglary and CCP aggravators; 3) the trial court erred in giving great weight to the burglary and prior violent felony aggravators; 4) the trial court erred in issuing a sentencing order that lacks clarity; 5) the trial court erred in refusing to require the State to follow the promise it made to the government of Mexico that it would not seek a death sentence if Carter were released into the State's custody; 6) that his death sentence is illegal under *Ring v. Arizona*, 536 U.S. 584, 609, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002); and 7) the trial court erred in giving standard jury instructions which diminished the jury's sense of responsibility for sentencing. The Florida Supreme Court also reviewed the sufficiency of the evidence and the proportionality of the death sentences. The Florida Supreme Court affirmed Carter's convictions and death sentences. *Carter v. State*, 980 So.2d 473, 477 (Fla. 2008).

Carter then filed a petition for writ of certiorari in the United States Supreme Court raising two issues: 1) whether the Florida Supreme Court properly determined that the definition of the crime of burglary sufficiently narrows the class eligible for the death penalty as required by the Eighth Amendment; and 2) whether the Florida statute abolishing the intoxication defense violates due process. On October 14, 2008, the United States

Supreme Court denied the petition. *Carter v. Florida*, - U.S.-, 129 S.Ct. 400, 172 L.Ed.2d 292 (2008)(No. 08-5606). Carter's convictions and sentences, therefore, became final on October 15, 2008.

On October 13, 2009, Carter filed a motion for post-conviction relief in the state trial court raising nine claims. On December 16, 2009, the State filed a response to that post-conviction motion arguing that this Court should summarily deny claims 2, 6, 7 and 8 but hold an evidentiary hearing on claims 1, 3, 4, 5 and 9.

On August 1, 2012, and September 24, 2012, the trial court conducted an evidentiary hearing. At the end of the evidentiary hearing, the trial court directed both parties to file post-evidentiary hearing memorandums of law. Both parties filed memorandums of law. (PC Vol. 3 541-618; Vol. 3 619-634). The trial court denied the 3.851 motion finding no ineffectiveness. (PC Vol. 3 644-683).

On appeal, Carter raises two issues: 1) whether trial counsel was ineffective for not presenting as risk assessment evidence as mitigation and whether trial counsel was ineffective for not filing a motion for change of venue.

SUMMARY OF ARGUMENT

ISSUE I

Carter asserts that his trial attorneys, Public Defender Bill White and Assistant Public Defender Alan Chipperfield, were ineffective for failing to argue for two statutory mitigators in the penalty phase. Carter claims that counsel was ineffective for not presenting the mitigation of risk and protective factors based on a Department of Justice study. There was no deficient performance. Counsel hired two mental health experts who performed traditional mental health evaluations. Presenting risk assessment mitigation would have opened the door to damaging prior incidences of violence. As defense counsel testified and the trial court found, not opening the door to these prior incidences was a major consideration in defense counsels' decision not to present the testimony of any mental health expert. As the trial court found, the decision to portray Carter as a hard-working, productive member of society who had simply deviated from his generally good character due to jealousy through lay testimony rather than a dangerous fellow at risk for violence through expert testimony about risk assessment was a reasonable strategic decision. Nor was there any prejudice from not presenting this type of mitigation. Much of the omitted mitigation was cumulative to the lay testimony that was actually presented. Carter would have still been sentenced to death for these three murders even if risk and protective factors mitigation had been presented as mitigation. Thus, the trial court properly denied the claim of ineffectiveness for not presenting risk assessment factors as mitigation.

ISSUE II

Carter asserts that defense counsels, Public Defender Bill White and Assistant Public Defender Alan Chipperfield, were ineffective for failing to file a motion for change of venue due to the publicity. This claim was abandoned at the evidentiary hearing. Post-postconviction counsel did not introduce any evidence establishing extensive publicity, such as newspaper articles, and asked no question of either counsel regarding the claim despite being granted an evidentiary hearing to explore the claim. Alternatively, the claim is meritless. There was no deficient performance because there was no trouble selecting a jury. As both trial counsel testified at the evidentiary hearing, there was no legal ground to file a motion for change of venue. There was no prejudice either. As the trial court found, any motion for change of venue would have simply been denied.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT PROPERLY DENIED THE CLAIM OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL FOR NOT PRESENTING RISK FACTORS EVIDENCE AS MITIGATION? (Restated)

Carter asserts that his trial attorneys, Public Defender Bill White and Assistant Public Defender Alan Chipperfield, were ineffective for failing to argue for two statutory mitigators in the penalty phase. IB at 9. Carter claims that counsel was ineffective for not presenting the mitigation of risk and protective factors based on a Department of Justice study. There was no deficient performance. Counsel hired two mental health experts who performed traditional mental health evaluations. Presenting risk assessment mitigation would have opened the door to damaging prior incidences of violence. As defense counsel testified and the trial court found, not opening the door to these prior incidences was a major consideration in defense counsels' decision not to present the testimony of any mental health expert. As the trial court found, the decision to portray Carter as a hard-working, productive member of society who had simply deviated from his generally good character due to jealousy through lay testimony rather than a dangerous fellow at risk for violence through expert testimony about risk assessment was a reasonable strategic decision. Nor was there any prejudice from not presenting this type of mitigation. Much of the omitted mitigation was cumulative to the lay testimony that was actually presented. Carter would have still been sentenced to death for these three murders even if risk and protective factors mitigation had been

presented as mitigation. Thus, the trial court properly denied the claim of ineffectiveness for not presenting risk assessment factors as mitigation.

Penalty phase

During the penalty phase, Defense counsel presented opening statement arguing for life without the possibility of parole. (T. Vol. XX 2125-2145). The defense presented numerous witnesses (T. Vol. XX 2198-2279; XXI 2285). They were lay witnesses including family, former high school girlfriend, football coach and friends. Defense counsel highlighted Carter's service with the Air Force. (T. Vol. XXI 2317-2358). Defense counsel presented the testimony of Carter's high school teachers. (T. Vol. XXI 2358,2434). He presented the testimony of Carter's college professor who led a club. (T. Vol. XXI 2476). Defense counsel introduced Carter's good work history through his employment records, his former employers and co-workers at Winn-Dixie and Publix. (T. Vol. XXII 2547, 2587,2607). Defense counsel also presented model prisoner testimony. (T. Vol. XXII 2631). The defense mitigation theme was that Carter was a good man for whom violence was uncharacteristic. (Vol. VI 1116).

Dr. Krop, who was appointed as a confidential mental health expert, did not testify. No mental health expert testimony was presented. Carter did not testify at the penalty phase. Defense counsel presented closing argument. (T. Vol. XXIII 2865-2879; T. Vol. XXIV 2883-2933).

On October 14, 2005, the jury recommended death for the murder of Pafford by a vote of nine (9) to three (3). (R. Vol. IV 640 (count I); T. Vol. XXIV 2959). The jury recommended death for the murder of Reed by a vote of eight (8) to four (4). (R. Vol. IV 642 (count II); T. Vol. XXIV 2960). The jury recommended life for the murder of Smith. (R. Vol. IV 645 (count III); T. Vol. XXIV 2960).

Defense counsel submitted a written sentencing memoranda in support of a life sentence. (R. Vol. IV 648-656). Defense counsel argued that a death sentence would not be proportional. He offered to waive all appeals and post-conviction proceedings if the judge sentenced him to life. (R. Vol. IV 650). He asserted that the death recommendations were "not strong mandates for the death penalty," "in view of the life recommendation for the murder of Courtney Smith." (R. Vol. IV 650).

At the *Spencer* hearing, the defense presented Officer Michelle Fletcher. (Vol. VI 1151). Officer Fletcher, who was a correctional officer, worked at the pretrial detention facility. (Vol. VI 1152). She testified that she had a lot of contact with defendant and he would try to keep other inmates out of trouble. (Vol. VI 1153). Carter would help the officers stop fights among the juvenile detainees. (Vol. VI 1153). Carter got along with the other inmates and the guards. (Vol. VI 1154). Carter was "no trouble," "very respectful," "very obedient" and they had no problem out of him. (Vol. VI 1154). She was not working at the time of the armband missing incident and did not know about it. (Vol. VI 1156-1157). She was not aware of the escape note. (Vol. VI 1162). A

stipulation was entered that Carter had no disciplinary reports (DRs) at the jail. (Vol. VI 1162-1163).

Both the prosecutor and defense counsel discussed their written sentencing memorandums. (Vol. VI 1165). Defense counsel argued that there was not sufficient evidence of the CCP aggravator. (Vol. VI 1170). He argued that Carter and Reed were together the Sunday before the murders. He also argued that if the evidence to support an aggravator is wholly circumstantial, then it must be inconsistent with the defendant's version. (Vol. VI 1171). Defense counsel asserted that Carter was jealous and emotional when the victim did not show up for a date. (Vol. VI 1171). Defense counsel argued that at least six jurors voted for life for the murder of Courtney Smith, three jurors voted for life for the murder of Glenn Pafford and four jurors voted for life for the murder of Liz Reed. (Vol. VI 1171-1172). He argued, relying on *State v. Steele*, 921 So.2d 538, 547 (Fla. 2005), that Florida is the only state that allows a death recommendation based on a simple majority vote and argued that this was certainly unusual and therefore, a violation of the Eighth Amendment. (Vol. VI 1172).

At the sentencing hearing, Carter personally addressed the court stating that he was "physically responsible for these deaths" but was "not mentally responsible." (R. Vol. VII 1181). Defense counsel referred to a few recent local capital trials involving young victims where the perpetrators got life sentences either through life recommendations from the jury or plea bargains.(R. Vol. VII 1184). Defense counsel argued Carter's life was "more exemplary" than those other perpetrators. (R. Vol. VII 1186).

Defense counsel referred to Carter's offer to plead guilty in exchange for a life sentence and waive all appeals and post-conviction proceedings. (R. Vol. VII 1186-1187). Defense counsel argued that the victim's family's wishes lead to a death sentence in some cases and a life sentence in other cases. (R. Vol. VII 1187-1188).

Evidentiary hearing testimony

Former elected Public Defender White testified that their strategy in penalty phase and focus for the mitigation case was to present Carter as good guy. (Evid H at 22). Carter, "in many ways" had "led a good life" and had done "many, many things that indicated that he was a good citizen, good brother, good son." (Evid H at 27-28). Carter had "an incredibly good work history." (Evid H at 28). Carter had also served in the Air Force for four years "in an exemplary manner." (Evid H at 28). They presented nearly 30 mitigation witnesses. They interviewed people from Oklahoma State University and introduced Carter's University records (Evid H at 39). They introduced medical records (Evid H at 39-40). The presented his employment history including his Publix records. (Evid H at 78).

They discussed mitigation at length with Carter. (Evid H at 78). They explored presenting Prozac as mitigation contacting a "number of experts in the United States and overseas." (Evid H at 35). The experts that they spoke with informed them that there was not sufficient information regarding the amount of Prozac to present it as mitigation. (Evid H at 70-80).

Both counsel decided not to use mental health experts to avoid prior acts of violence in Carter's past. (Evid H at 23,42). They consulted with both Dr. Krop and Dr. Miller. (Evid H at 23). They also had Dr. McCrainie perfrom both a MRI and a PET scan. (Evid H at 23). They conducted a "pretty extensive review" of Carter's health. (Evid H at 23). White had worked with Dr. Krop "many times" previously and was confident of his abilities. (Evid H at 24). White testified that Dr. Krop has a "good reputation" and Dr. Miller was "highly regarded" and "used by both sides." (Evid H at 57-58). However, based on these experts there was not sufficient evidence for either statutory mental mitigator. (Evid H at 44-45). Neither expert would testify in support of the statutory mental mitigators. (Evid H at 58,82).

PD White was aware of the Department of Justice studies identifying certain risk and protective factors that may lead to delinquency and violence. (Evid H at 29).[2]
He did not know if he was aware of the study at the time of Carter's penalty phase in 2005. (Evid H at 29). According to the D.O.J. formula, because there were "multiple comorbid events, there was a significant or high chance of an explosive situation. (Evid H at 47). They did not consider using the study as support but they did present those factors such as Carter's family background. (Evid H at 47). White was aware that Carter's father abandoned him

[2] J. David Hawkins, et. al., Predictors of Youth Violence, *Juvenile Justice Bulletin* (Apr. 2000) Office of Juvenile Justice and Delinquency Prevention, U.S. Dep't of Justice, available at http://www.ncjrs.gov/pdffiles1/ojjdp/179065.pdf

and that Carter was emotionally abused by his step-father. (Evid H at 31-32). He was also aware Carter's mother suffered from depression. (Evid H at 32). They did not present an expert in the D.O.J. formula at the penalty phase in front of the jury or at the *Spencer* hearing in front of the judge. (Evid H at 48). Rather, they presented the substance of Carter's life through lay witnesses. (Evid H at 61).

PD White testified that he read Dr. Gomez's report and agreed with it. (Evid H at 30,46-47). He agreed that the risks and protective factors of Carter's life would be useful mitigation. (Evid H at 41-42). Public Defender White testified that he reviewed Dr. Gomez's report but felt it contained information that was harmful. (Evid H at 24,46-47). Public Defender White thought that any such presentation would conflict with their "good guy" mitigation and would have opened the door to prior bad acts. (Evid H at 49-50,83). Carter had a prior arrest in Oklahoma involving his ex-wife that the prosecutor knew about. (Evid H at 25). White explained that if he called either of the experts to testify, they would be required to talk about the incident in "detail." (Evid H at 85-86). They were attempting to keep that prior incident from the jury and the judge. (Evid H at 25,60).

Dr. Francisco Gomez, a forensic neuropsychologist, testified. (Evid H at 89-90). He has a Ph.D. in Clinical Psychology from Boston University. (Evid H at 90). He completed an internship and two years of post-doctoral training. (Evid H at 90).

Dr. Gomez interviewed Pinkney Carter. (Evid H at 94). He reviewed counsels' records; mental exam by the US Air Force, the

notes of the prozac experts, notes of Dr. McCranie; the MRI and PET scans by Dr. McCranie; notes of Dr. Krop; notes of Dr. Miller; Dr. Krop's letter dated 10/27/2004; Dr. Krop's preliminary findings dated 7/21/2004; Dr. Miller's written notes and 12 pages of Dr. Miller's typed notes; and a transcript of the penalty phase. (Evid H at 95-96). Dr. Gomez's July 25, 2012 report was introduced as defense exhibit #1. (Evid H at 94-95, 142-143).

Dr. Gomez gave Carter an I.Q. test, the WAIS-IV; an achievement test, the WRAT IV; a sensory field test; a grooved pegboard test; a complex figure drawing test; a verbal fluency test; a Ruff Figural Fluency test; Stroop test; the Delis-Kaplan Trial Making test; the California Verbal learning test; the Wisconsin Card Sort test; and a MMPI-2 personality test. (Evid H at 97-108). Dr. Gomez determined that Carter was not malingering on these tests but he was defensive. (Evid H at 109). Carter minimizes his symptoms. (Evid H at 109). Although Carter was "restless" during these tests, Dr. Gomez did not diagnosis Carter as having attention deficit disorder. (Evid H at 109). Dr. Gomez labeled Carter as emotionally immature and testified that Carter had poor insight into his own behavior. (Evid H at 110).

Dr. Gomez testified that he was familiar with the U.S. Department of Justice's juvenile risk assessment unit. (Evid H at 111). He had several grants including one as director of Head Start, looking at risks and protective factors. (Evid H at 111-112). The Department of Justice, after funding studies for 30 years, collected experts in family issues to identify and they

grouped the problems into five areas. (Evid H at 112-113).[3] They developed a risk and protective model. (Evid H at 114). "In other words, what are the things that put you at risk and what are the thing that protect you from getting in trouble." (Evid H at 114). The big conference was in 2002. (Evid H at 114). There are 24 risk factors in the five areas. (Evid H at 117). Poverty is a heavily weighted risk factor in the community area. (Evid H at 118).

Dr. Gomez found Carter had a risk factor for child maltreatment. (Evid H at 124). There was a a low level of parental involvement in Carter's family. (Evid H at 124). Carter's father was neglectful and then abandoned him. His mother suffered from depression. (Evid H at 124). Parents who are depressed are not as emotionally connected to their children. (Evid H at 124).

The family moved a lot which is another risk factor. (Evid H at 126). Carter flunked the third grade. (Evid H at 127). Carter, however, had no peer related risk factors. (Evid H at 128). Dr. Gomez's report details the risk and protective factors. (Evid H at 128-129).

Dr. Gomez read Dr. Krop's report, Dr. Miller's report, and Dr. McCranie's report of the MRI and PET scan. (Evid H at 129). Dr. Gomez testified that counsel White was concerned about revealing Carter's part criminal behavior by presenting mental experts was unfounded because an expert could have explained that behavior to a jury. (Evid H at 129-130).

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[3] The five areas are: individual; family; school; peer-related; community/neighborhood; and situational factors.

Dr. Gomez testified that the two highest risk factors for violence are being male and being 18 to 35 years old. (Evid H at 132). "There is nothing higher that can predict violence than that." (Evid H at 132-133). When a person hits 40 years of age, the crime rate "goes way down." (Evid H at 133).

Carter had a lot of situational risk factors at the time that account for his aberrant conduct. (Evid H at 132). Comorbid risk factors are things that happen together - co-occurring events. (Evid H at 133). Carter had borderline personality disorder that made him very impulsive and depressed, which in an emotionally-charged situation, made the risks for his acting aberrantly go way up. (Evid H at 133-134). If you put these situations all together that is when it becomes toxic. (Evid H at 135). The Air Force gave Carter a MMPI and he scored a "5,4 pattern" which is the classic "really hysterical" person who acts out. (Evid H at 135-136). Carter has neurological impairments coupled with these risks. (Evid H at 136-137).

Dr. Gomez thought that Dr. Miller's reports contained many of the risk factors but the report did not "put it in a way to explain to the Court." (Evid H at 138). Those reports corroborated his findings. (Evid H at 138). Neither Dr. Krop nor Dr. Miller found different things than Dr. Gomez other than hyperactivity. (Evid H at 138). All of the experts, Dr. Krop, Dr. Miller and Dr. Gomez, looked at the same factors, such as family history. (Evid H at 138-139).

Dr. Gomez testified that both mental mitigators applied. (Evid H at 139-140). Dr. Gomez testified that Carter would do well in a

structured environment such as prison. (Evid H at 142). Carter has not had a single disciplinary report (D.R.) in his ten years in prison. (Evid H at 142). His D.O.C. records were introduced as defense exhibit #2. (Evid H at 142-143).

On cross, Dr. Gomez stated that he had testified in approximately 30 penalty phases in capital cases regarding risk assessment, all for the defense. (Evid H at 145). Dr. Gomez testified that his final fee would probably end up being $12,000 dollars. (Evid H at 147).

Dr. Gomez explained the D.O.J. study is available on the website at the Rochester Youth Study in which they followed families over 20 years. (Evid H at 147). Dr. Gomez was confused about Carter's age on the date of the crime. (Evid H at 148). Dr. Gomez mistakenly thought that Carter was 36 or 38 years old on the date of the crime; rather than 47 years old. Dr. Gomez mistakenly thought the crime occurred in 2000 rather than in 2002 and he also miscalculated Carter's age even as to that date. (Evid H at 149, 150-151). Dr. Gomez admitted that Carter was beyond the normal age limit of 35 years old for criminal behavior but Dr. Gomez felt that analysis was the same. (Evid H at 151).

Dr. Gomez considered Carter impulsive rather than aggressive. (Evid H at 152). While Carter could be aggressive in certain situations, he was not "aggressive all the time with everybody." (Evid H at 152).

Carter's disorder is with females. (Evid H at 152). He has had a lot of brief and unstable relationships. (Evid H at 152). The prior incident was with his ex-wife and Carter was wearing a mask

and had a knife. (Evid H at 153). Carter put the knife to her throat and threatened to kill her. (Evid H at 153).

Dr. Gomez viewed this as being "more sexually deviant." (Evid H at 154). Carter was "hypersexual." (Evid H at 154). Carter was acting out a fantasy. (Evid H at 155). Carter was put in a deferred prosecution program for that offense. (Evid H at 156).

Dr. Gomez testified that he did not know "what's good for a jury to hear." (Evid H at 157). And he did not know whether it would be good for a jury to hear that Carter was a sexual deviant. (Evid H at 157-158). Dr. Gomez admitted that the incident would come out if he had been presented as an expert. (Evid H at 158).

Carter also had another incident of domestic violence in Illinois. (Evid H at 163-164). Carter was charged with domestic violence and sent to anger management classes. (Evid H at 164).

Dr. Gomez discussed his diagnosis of Carter as having borderline personality disorder. (Evid H at 164). Persons with borderline personality disorder have "highly tumultuous" relationships and act aggressively in relationships. (Evid H at 164).

Dr. Gomez testified that according to the D.O.J. study those who go to college, their risk for violence goes "way down." (Evid H at 166-167). "The more education you have, the less trouble you get in." (Evid H at 168). Carter attended college for three years. (Evid H at 168). Dr. Gomez considered Carter's violence the result of a "perfect storm" with a lot of situational factors coming into play that lowered his protective factors. (Evid H at 169).

Dr. Gomez testified that the results of his tests "suggested" that Carter had left frontal lobe impairments. (Evid H at 170).

The prosecutor noted that the results of the PET scan and MRI were normal. (Evid H at 170). Dr. Gomez testified that such normal results were not "uncommon" when the impairments are minor because the scans are not sensitive enough to detect them. (Evid H at 170-171). The State introduced the PET scan conducted by Dr. McCranie results as State exhibit #1. (Evid H at 171). Carter's I.Q. score on Dr. Gomez's test was 97 which is in the "average range." (Evid H at 172).

Dr. Gomez reviewed Dr. Krop's letter. (Evid H at 172-173). The State introduced Dr. Krop's letter dated July 21, 2004 as State's exhibit #2 and Dr. Krop's letter dated October 27, 2004, as State's exhibit #3. (Evid H at 174). Dr. Krop's July 21, 2004 letter mentioned anger management. (Evid H at 175). Dr. Gomez admitted that but he had not read the guilt phase and was not familiar with the details of the crime. (Evid H at 177-178, 184). Dr. Gomez also admitted that he had not read the Florida Supreme Court's opinion. (Evid H at 195). Dr. Gomez additionally admitted that his knowledge of the facts from the defendant could have been a little biased. (Evid H at 195-196).

Dr. Gomez reported that Carter lacked a father figure due to his father abandoning him. (Evid H at 204). His step-father, who was an alcoholic and abusive, was a negative influence. (Evid H at 204-205). Not having a male influence is a big risk factor in committing crime of violence. (Evid H at 205).

Dr. Gomez's report contained an earlier domestic violence incident that occurred while Carter was in the Air Force. (Evid H at 208-209). Dr. Gomez's diagnosis was a cognitive disorder not

otherwise specified. (Evid H at 211). Dr. Krop had also found mild impairments. (Evid H at 211). Dr. Gomez also diagnosed Carter as having borderline personality disorder. (Evid H at 212). Dr. Gomez testified that Carter did not meet the the DSM-IV-TR criteria for anti-social personality disorder. (Evid H at 212-215). Borderline personality disorder is a severe personality disorder with a high rate of aggressive behavior. (Evid H at 217). Dr. Gomez's report indicated Carter has a significant number of risk factors for violence. (Evid H at 215-216).

The trial court noted that Dr. Gomez's finding were inconsistent with the medical findings. (Evid H at 225-226). But Dr. Gomez's findings were consistent with Dr. Krop's findings. (Evid H at 226).

On September 24, 2012, the evidentiary hearing continued with Chief Assistant Public Defender Chipperfield testifying. (Evid H at 239-240). He testified regarding his extensive experience in capital cases. (Evid H at 241-242). Both he and co-counsel Bill White worked on both guilt and penalty phase together. (Evid H at 243).

They did not call any mental health expert in the penalty phase. (Evid H at 245). They hired both Dr. Krop and Dr. Miller. (Evid H at 279-280). Chipperfield considered Dr. Krop to be qualified and he had presented Dr. Krop in the past in capital cases. (Evid H at 290,292). Chipperfield testified that he gave all the information to Dr. Krop to see what he could come up with but decided they were better off not presenting Dr. Krop. (Evid H at 259,292). Dr. Krop's conclusions were "not that helpful." (Evid H at 276). Dr. Krop "found some soft neurological signs" of impairment. (Evid H at

287). They were aware of the "soft" signs of impairment but decided not to call Dr. Krop. (Evid H at 287). What little benefit there was from presenting Dr. Krop was outweighed by opening the door to damaging information. (Evid H at 287-288). There was not enough good to be had of Dr. Krop to justify opening those doors. (Evid H at 293).

Chipperfield explained that using Dr. Krop would have allowed the prosecutor to have a State mental health expert evaluate Carter and would have allowed the prosecutor to cross-examine Dr. Krop regarding the incident with the ex-wife. (Evid H at 276). The prosecutor and Bill White had gone out to Oklahoma and interviewed or deposed the ex-wife. (Evid H at 276). Chipperfield explained that the incident involving the ex-wife would not have been a good thing for the jury to hear because it was "another incident where Mr. Carter lost control." (Evid H at 276-277). Dr. Krop would have been cross-examined regarding that incident. (Evid H at 277). Chipperfield explained that presenting Dr. Krop would have opened the door to that prior incident. (Evid H at 277).

Both counsel wanted to keep the incident with the ex-wife from the jury because "it would really hurt" the quest for a life recommendation. (Evid H at 245). And that was one reason why they did not present a mental health expert. (Evid H at 246). The other reason was that neither mental health expert had any valuable mitigation. (Evid H at 246, 247). Dr. Gomez's report, on page 11, referred to the prior incident with the ex-wife. (Evid H at 285). Dr. Gomez could have been cross-examined by the prosecutor regarding that incident. (Evid H at 288-289). Chipperfield again

testified that they did not want the jury to hear about the problem with his ex-wife. (Evid H at 285).

Chipperfield recalled that they had Dr. McCranie administer a PET scan on Carter, the results of which showed that Carter was normal. (Evid H at 280-281)

Their mitigation strategy was to portray Carter as a good guy who did a horrible thing. (Evid H at 246). When asked why he thought good guy mitigation was a good strategy likely to result in a life sentence, Chipperfield responded:

> He was a good guy. I mean of all the people I have represented, I think he's the only one whoever worked every quarter of every year from the time he was old enough to work. He'd gone to college. He served in the Air Force. He had all kinds of good things in his background that we were able to present and that together with the fact that the crime was obviously was an emotional thing for him. He was in love with this woman and they had raised children together.

(Evid H at 253-254). Chipperfield observed that the crime was "an aberration in his behavior that's not likely to come again and that he had characteristics that were good enough and humane enough" that a jury "would think he deserved a life sentence." (Evid H at 252).

Chief Assistant Public Defender Chipperfield testified that they consulted with experts regarding Prozac. (Evid H at 246). They explored and researched presenting Prozac intoxication as mitigation but they could not put it together. (Evid H at 273). They consulted experts in the U.K. (Evid H at 247). Chipperfield testified that they explored and researched presenting Prozac intoxication as mitigation but they could not put it together. (Evid H at 273-274). They "just couldn't put together a cohesive,

persuasive argument" but they tried and they "gathered a lot of research about it." (Evid H at 274).

They did not present risk assessment mitigation at the *Spencer* hearing. (Evid H at 248,249). Rather, they presented the same information as Dr. Gomez through lay family and friends. (Evid H at 248). Chipperfield testified that the mental health mitigators "are very important." (Evid H at 249). They did not argue for the mental mitigation either in front of the jury or to the judge. (Evid H at 250). He did not have the idea of presenting an expert, such as a specialist mitigation, who had not examined the defendant but who could testify and identify risk factors. (Evid H at 251). Chipperfield acknowledged that such an expert would be persuasive and convincing without risking exposure of harmful background information. (Evid H at 251).

Chief Assistant Public Defender Chipperfield testified that he read Dr. Gomez's report. (Evid H at 274,275). His opinion was that Dr. Gomez stated a "pretty good case for both statutory mental mitigators." (Evid H at 274). He did not know if Dr. Gomez would make a good witness and could not judge that without sitting down and talking with him. (Evid H at 274-275;289). Chipperfield explained that he never calls an expert to testify without sitting down with the expert to evaluate how the expert would come across to the jury. (Evid H at 275).

Chipperfield testified that he agreed with Dr. Gomez's report that Carter was functioning in the average intellectual range. (Evid H at 284). He personally did not see anything that showed

"exceptional intelligence or sub-average intelligence" in his dealings with Carter. (Evid H at 284).

Chipperfield testified that without calling them risk factors, they presented Carter's life history. (Evid H at 286). Chipperfield testified as to his understanding of risk assessment. (Evid H at 293). The risk factors are really the same as family history. (Evid H at 293). The substance of that was provided to Dr. Krop and presented to the jury. (Evid H at 294).[4]

Standard of review

The standard of review for a claim of ineffective assistance of counsel is *de novo*. This Court reviews a postconviction court's

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[4] Opposing counsel refers to a 2004 letter from Dr. Krop in his brief as being "on file." IB at 12. The state assumes that this is some sort of a typographical error. It is highly improper to refer any matter outside the record. *Ullah v. State*, 679 So.2d 1242, 1244 (Fla. 1st DCA 1996)(observing that it is "elemental that an appellate court may not consider matters outside the record" and when a party refers to such matters in its brief, it is proper for the court to strike the brief citing *Thornber v. City of Fort Walton Beach*, 534 So.2d 754 (Fla. 1st DCA 1988)); *Rutherford v. Moore*, 774 So.2d 637, 646 (Fla. 2000)(observing that the appellate record is limited to the record presented to the trial court). If opposing counsel wanted to use the letter as support for this claim of ineffectiveness, he needed to introduce it at the evidentiary hearing during APD Chipperfield's testimony and have Chipperfield explain the contents of the letter - that is the point of conducting evidentiary hearings. Having not done so in the trial court, counsel may not refer to the letter in the appellate court.

The record evidence was the testimony at the evidentiary hearing that Dr. Krop "found some soft neurological signs" of impairment. (Evid H at 287). And the trial court in its order denying the postconviction motion, noted there was no evidence of the defendant ever being diagnosed with bipolar disorder. (PC. Vol. 3 673 at n.14). This is the sole record evidence.

rulings on the performance and prejudice prongs of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), *de novo*. *Johnson v. State*, 104 So.3d 1010, 1022 (Fla. 2012). This Court, however, defers to any factual findings made by a postconviction court regarding the claim following an evidentiary hearing due to a trial court' "superior vantage point in assessing the credibility of witnesses and in making findings of fact." *Johnson*, 104 So.3d at 1022.

The trial court's ruling

The trial court denied this claim of ineffectiveness finding both that there was no deficient performance and that there was no prejudice. (PC Vol. 3 672-682). The trial court noted that defense counsels presented the testimony of 27 lay witnesses during the penalty phase who testified regarding extreme poverty, neglect, abandonment by their father, abusive step-father, as well as his good military service and employment history. (PC Vol. 3 674-676). The trial court noted Dr. Gomez's testimony at the evidentiary hearing regarding risk and protective factors. (PC Vol. 3 676-677). The trial court found that defense counsel Mr. White and Mr. Chipperfield investigated and presented "childhood and family history, social background, educational background, and employment history" (PC Vol. 3 677). The trial court concluded that defense counsel "brought in evidence of risk and protective factors" through lay testimony "without identifying them as such to the jury." (PC Vol. 3 677). The trial court noted that while defense

counsel White testified that the Department of Justice's report regarding risk and protective factors was not part of the strategic calculations, they looked at the same type of information when gathering mitigation. (PC Vol. 3 678). Defense counsel White testified that Dr. Gomez's report contained the harmful information about Carter's prior arrests that they were trying to avoid. (PC Vol. 3 678). Defense counsel White testified that the report opened the door to negative information and contradicted their good-guy mitigation strategy (PC Vol. 3 679, 680 citing Evid H at 49-50)). Defense counsel White also testified that he would not present this mitigation at the *Spencer* hearing either would have because it could have the same "negative" effect on the judge as the jury. (PC Vol. 3 679).

The trial court found that the risk and protective factors were cumulative to the evidence actually presented though the numerous law witnesses. (PC Vol. 3 680).

The trial court also concluded that any such testimony by an expert would open the door to the prior incidences of violence (PC Vol. 3 680-681 citing cases). The trial court noted during this investigation, defense counsel uncovered several incidents of domestic violence and an aggravated assault which they sought to prevent from being revealed to the jury. (PC Vol. 3 677-678). The trial court recounted that the mitigation strategy was to present the defendant as a "good guy who had a bad day." (PC Vol. 3 678). The trial court noted that defense counsel had three mental health experts, Drs. Krop, Miller and McCrainie, evaluate the defendant. (PC Vol. 3 678). But they decided that any benefit from presenting

their testimony regarding “some signs of possible neurological issues,” would have “been outweighed by the damage of revealing the past incidences of violence.” (PC Vol. 3 678).

The trial court also rejected the contention that risk factors should have been presented at the *Spencer* hearing because there was no reasonable probability that the judge would have imposed a life sentence. (PC Vol. 3 681).

The trial court found that there was no prejudice either because there were three aggravating circumstances including CCP, one the weightiest aggravators. (PC Vol. 3 681-682). Even if risk factors had been presented either to the jury or to the judge, given the aggravation as well as the unknown prior incidence of violence which were successfully kept from both the jury and the judge, there was no reasonable probability of a different outcome. (PC Vol. 3 682). The trial court, relying on *Wong v. Belmontes*, 558 U.S. 15, 130 S.Ct. 383, 390, 175 L.Ed.2d 328 (2009), noted that to properly gauge prejudice, a court must consider the State’s likely rebuttal to that mitigation and no prejudice occurs when bad evidence would come in with the good mitigation. (PC Vol. 3 682). The trial court concluded that the decision not to present mental health experts was a “reasonable informed strategic decision” and that the defendant “also failed to demonstrate prejudice.” (PC Vol. 3 682).

Merits

To establish ineffective assistance of counsel, a defendant must establish both deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The defendant must satisfy both the performance and prejudice prongs to show ineffectiveness.

There is a strong presumption that trial counsel's performance was not ineffective. *Pagan v. State*, 29 So.3d 938, 949 (Fla. 2009). "A fair assessment of an attorney's performance 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." *Pagan*, 29 So.3d at 949 (quoting *Strickland*, 466 U.S. at 689). Judicial scrutiny of counsel's performance must be highly deferential. "Strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct." *Pagan*, 29 So.3d at 949 (quoting *Occhicone v. State*, 768 So.2d 1037, 1048 (Fla. 2000)). An attorney can almost always be second-guessed for not doing more but that is not the standard. *Id.*

Prejudice means there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. A reasonable probability is a probability sufficient to undermine confidence in the outcome. The strong presumption that counsel's performance was reasonable is even stronger when trial counsel is

"particularly experienced." *Reed v. Sec'y, Fla. Dep't. of Corr.*, 593 F.3d 1217, 1244 (11th Cir. 2010)(citing *Chandler v. United States*, 218 F.3d 1305, 1316 & n.18 (11th Cir. 2000)(en banc)). Carter was represented by Public Defender Bill White and Assistant Public Defender Alan Chipperfield. Both defense counsel were death certified attorneys with extensive trial experience including in capital cases. (T. Vol. IX 6).

Elected Public Defender William White first started working at the Office of the Public defender in 1974. (Evid H at 18-19). He became the Chief Assistant Public Defender in 1976 and remained the Chief Assistant until 2005 when he became the elected Public Defender. (Evid H at 19). He had handled "dozens" of murder trials and a "significant number" of capital trials. (Evid H at 19). At the time of this trial, in September of 2005, he had been a public defender for over 30 years. (Evid H at 19).

Chief Assistant Public Defender Alan Chipperfield testified at the evidentiary hearing that he worked for the Public Defender's office from 1979 until 1991 when he went to work with a personal injury firm for three years. (Evid H at 241). He then returned to the Public Defender's Office from 1995 until 2008. (Evid H at 242). In 2008, he joined the Gainesville Public Defender's Office and is now the Chief Assistant Public Defender in that office. (Evid H at 242). He has been a public defender for approximately 29 years and had been a public defender for 22 years by the time of this trial in September of 2005. He had tried 33 first-degree murder cases prior to representing Carter. (Evid H at 241). He had tried 22 penalty phases prior to representing Carter. (Evid H at

242). Twenty of those penalty phases were tried before a jury. (Evid H at 242). He was widely considered the best attorney in the office by both the Public Defender's Office and the State Attorney's office, as well as the local bench and bar. (Evid H at 53). Quite simply, Chief Assistant Public Defender Chipperfield has unparalleled experience in capital cases. *Bradley v. State,* 33 So.3d 664, 672-73 (Fla. 2010)(documenting Alan Chipperfield's capital experience including organizing and given many seminars on how to handle death cases and being on the steering committee for planning each year's seminar); *cf. United States v. Orleans-Lindsay*, 572 F.Supp.2d 144, 155 (D.D.C. 2008)(characterizing an attorney who had represented at least fifteen defendants charged with federal or state capital murder offenses to be a "highly experienced" death-penalty-qualified attorney).[5]

Carter had not one but two highly experienced public defenders representing him. While even the best attorney can have a bad day, capital cases do not last one day. Both the number and experience of these attorneys negate any real possibility of ineffectiveness.

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[5] Public Defender William White explained that there was not really a lead counsel/second-chair counsel division in this case. Rather, they were co-counsel. (Evid H at 54). He and Chipperfield worked jointly and both investigated the case. (Evid H at 18-19). Chipperfield picked the jury. White did the argument in guilt phase and Chipperfield did the argument in penalty phase. (Evid H at 54). They divided the witnesses. (Evid H at 54). While investigators were involved, they did most of the investigation of the case themselves. They end up traveling to Georgia, Oklahoma, Kansas, Texas and Oregon. (Evid H at 55). Both defense counsel were in agreement regarding strategy and were "on the same page" regarding the case. (Evid H at 87).

No duty to present expert testimony in mitigation

The United States Supreme Court has directly held that counsel is not required to present an expert to tie all the mitigation together to be effective. *Wong v. Belmontes*, 558 U.S. 15, 130 S.Ct. 383, 388, 175 L.Ed.2d 328 (2009)(rejecting a claim of ineffectiveness for failing to present expert testimony to "make connections between the various themes in the mitigation case" and to explain to the jury how they could have contributed to the defendant's involvement in criminal activity in a case where counsel, in fact, presented substantial lay mitigation in support of his "humanizing" theme). Basically, the United States Supreme Court has directly rejected this exact type of claim of ineffectiveness in *Belmontes*. *see also Stanley v. Zant*, 697 F.2d 955, 961, 965 (11th Cir. 1983)(stating that there is no duty to present general character evidence in every capital case and explaining that counsel is not required to present all possible mitigation that might exist; rather, counsel may reasonably conclude that such evidence would be of little persuasive value or that it would cause more harm than good).

No deficient performance established

There was no deficient performance. Presenting a good guy mitigation case is a reasonable mitigation strategy, particularly in this case, where there was a lot of support for such a portrayal including Carter's long employment history. When asked why he thought good guy mitigation was a good strategy likely to result in

a life sentence, Chief Assistant Public Defender Chipperfield responded:

> He was a good guy. I mean of all the people I have represented, I think he's the only one whoever worked every quarter of every year from the time he was old enough to work. He'd gone to college. He served in the Air Force. He had all kinds of good things in his background that we were able to present and that together with the fact that the crime was obviously was an emotional thing for him. He was in love with this woman and they had raised children together.

(Evid H at 253-254). Chipperfield observed that the crime was "an aberration in his behavior that's not likely to come again and that he had characteristics that were good enough and humane enough" that a jury "would think he deserved a life sentence." (Evid H at 252). Carter was an excellent candidate for a good guy mitigation strategy based his personal history and the nature of the crime. It may well have been only the sheer number of victims and the fact that one of the three victims was a teenage girl that prevented this strategy from successfully resulting in a life sentence.[6] The trial court found seventeen nonstatutory mitigators based on the mitigation presentation including that Carter had "a distinguished military record in the United States Air Force" and "was a good employee with supervising responsibilities and had a consistent work record from a young age." The decision to portray Carter as a hard-working, productive member of society who had simply deviated from his generally good character due to jealousy through

[6] The jury sentenced Carter to life for the murder of the teenage daughter, Courtney Smith, not death but her murder was used as one of the aggravators to obtain a death sentence for the murders of the other two victims.

lay testimony rather than a dangerous fellow at risk for violence through expert testimony about risk assessment was a reasonable strategic decision.

The Florida Supreme Court, in numerous cases, has found presenting good guy mitigation to be a reasonable strategic decision. *Wheeler v. State*, 124 So.3d 865, 884 (Fla. 2013)(affirming a trial court's finding that trial counsel's decision to "humanize" the defendant instead of offering mental health mitigation was a strategic decision and as such was not ineffective assistance of counsel); *Rutherford v. State*, 727 So.2d 216, 222-23 (Fla. 1998)(concluding that counsel to portray him as a hard-working, family-oriented "Boy Scout" type, who just lost it, to humanize him was a reasonable strategic decision); *Haliburton v. Singletary*, 691 So.2d 466, 471 (Fla.1997)(concluding trial counsel's penalty phase strategy to humanize the defendant and not call any mental health experts was not ineffective assistance of counsel).

In *Stephens v. State*, 975 So.2d 405, 414-15 (Fla. 2007), this Court rejected a claim of ineffectiveness for not presenting a mental health expert as mitigation when the expert's testimony would have conflicted with the 'good guy' mitigation. Dr. Jethrow Toomer testified at the evidentiary hearing that a mental health expert would have been able to educate the jury as to why Stephens acted as he did. But the trial court found that Dr. Toomer's testimony could have been harmful because it seemed to suggest that the description of Stephens' childhood portrayed through the testimony of witnesses at the penalty phase was false. This Court

agreed that presenting a mental health expert "would have contradicted and undermined" the 'good guy' image that counsel was attempting to portray. The Stephens Court explained that "counsel cannot be deemed ineffective when he made a strategic decision to focus on the positive aspects of Stephens' life instead of seeking a third opinion." *Stephens*, 975 So.2d at 415.

In *Bradley v. State*, 33 So.3d 664, 678-79 (Fla. 2010), the Florida Supreme Court rejected a claim of ineffectiveness for failing to present expert mental health testimony as mitigation in a case where counsel "painstakingly investigated potential mitigation" including mental mitigation. Counsel decided not to provide his experts with one page of mental health records suggesting that Bradley might be prone to violence without his medications and also decided not to call the mental health experts to testify during the penalty phase. The Florida Supreme Court concluded that those actions were strategic choices based on an informed and reasoned plan. *Bradley*, 33 So.3d at 679. The Court also noted that presentation of mental mitigation with hints of violence would have conflict with the mitigation theory that Bradley was generally a hard-working, productive member of society who had simply deviated from his generally good character.

Here, as in *Bradley*, counsel decided not to present any expert mental health testimony as mitigation after a painstaking investigation of potential mitigation including mental mitigation. Here, counsel throughly investigated mitigation including mental mitigation. Counsel hired two mental experts, Dr. Krop and Dr. Miller, both of whom had prior experience in forensic evaluations

for capital cases. Counsel had both a MRI and a PET scan conducted by a third expert. Counsel not only hired well-known defense mitigation mental experts but also explored Prozac intoxication as mitigation with other experts including experts in the U.K.

Furthermore, here as in *Stephens* and *Bradley*, presentation of mental mitigation with hints of violence would have conflicted with the mitigation theory that Carter was a hard-working, productive member of society who had simply deviated from his generally good character due to jealousy. Indeed, *Bradley* involved Alan Chipperfield and his decision not to present Dr. Krop in that case. *Bradley*, 33 So.3d at 672, 677. Basically, *Bradley* is directly on point involving the same counsel making the same decision regarding not to present the same expert for much the same reasons.

In *Taylor v. State*, 120 So.3d 540, 548-50 (Fla. 2013), the Florida Supreme Court rejected a claim of ineffectiveness for failing to present the mental health expert, Dr. Krop, at the penalty phase. The Court observed that trial counsel is granted great latitude in decisions regarding the use of expert witnesses. *Taylor*, 120 So.3d at 549 (quoting *Franqui v. State*, 965 So.2d 22, 31 (Fla. 2007)). The Court also noted that trial counsel will not be held to be deficient when he makes a reasonable strategic decision to not present mental mitigation testimony during the penalty phase because it could open the door to other damaging testimony. *Taylor*, 120 So.3d at 549 (citing *Gaskin v. State*, 822 So.2d 1243, 1248 (Fla. 2002) and *Ferguson v. State*, 593 So.2d 508, 510 (Fla. 1992)). The Court found no deficient performance because the mental health expert would have testified to damaging

information regarding Taylor's antisocial "tendencies." *Taylor*, 120 So.3d at 549. Counsel had testified that he decided not to present Dr. Krop because his "wishy-washy" opinion regarding Taylor's antisocial tendencies would likely work against them and the expert himself had expressed the fear that cross-examination regarding the matter would likely be detrimental to the defense. *Id.* at 549-50. This Court concluded that counsel's decision not to present a mental health expert was "a reasonable strategy under the circumstances." *Id.* at 550. This Court also found no prejudice because neither statutory mitigator was likely to be found by the trial court where the expert had found no organic brain damage or any other major mental illnesses to establish mental mitigation and no major mental illnesses was shown at the evidentiary hearing either. *Id.* at 550.

Here, as in *Taylor*, there was no deficient performance. Given that the most the experts had to offer was "some signs of possible neurological issues," counsel made a reasonable strategic decision not to present expert testimony which would have, in counsel's view "been outweighed by the damage of revealing the past incidences of violence." And, here, as in *Taylor*, any risk assessment testimony during the penalty phase could have opened the door to other damaging testimony.

Here, as in *Taylor*, a trial court would have been unlikely to find either statutory mental mitigator based on a study regarding risk factors for violence. While opposing counsel boldly asserts that Dr. Gomez's testimony would provide the basis for a finding of the statutory mental mitigators, it would not. *Taylor*, 120 So.3d

at 550 (finding no prejudice because neither statutory mitigator was likely to be found by the trial court where the expert had found no organic brain damage). For example, one of the major risk factors is poverty. But poverty is not mental mitigation. While poverty certainly is mitigating, it is not a mental illness that would provide a basis for a finding of mental mitigation much less the two statutory mental mitigators. The other risk factors suffer from the same flaw, they are not mental mitigation either. Counsel cites no case from any court finding risk factors to be ***mental*** mitigation.

As the trial court found, the decision to portray Carter as a hard-working, productive member of society who had simply deviated from his generally good character due to jealousy through lay testimony rather than a dangerous fellow at risk for violence through expert testimony about risk assessment was a reasonable strategic decision. Opposing counsel asserts that the decision not to present risk factors as mitigation could not be a reasonable strategic decision because neither counsel really considered presenting this type of mitigation instead of the traditional mental health mitigation. Even if counsel cannot directly testify that he considered a particular course of action, that does not mean that it was not reasonable strategic decision because the standard for a *Strickland* claim is an objective standard. *Cullen v. Pinholster*, – U.S. –, 131 S.Ct. 1388, 1404–06, 179 L.Ed.2d 557 (2011)(holding, even though trial counsel had "no recollection" of his preparation for the penalty phase, the record supported the idea that counsel acted strategically); *Harrington v. Richter*, -

U.S. -, -, 131 S.Ct. 770, 790, 178 L.Ed.2d 624 (2011)(noting the *Strickland* inquiry focuses on "the objective reasonableness of counsel's performance, not counsel's subjective state of mind"). As the *Richter* Court explained, although courts may not indulge "post hoc rationalization" for counsel's decisionmaking that contradicts the available evidence, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. *Richter*, 131 S.Ct. at 790 (concluding the Court of Appeals "erred in dismissing strategic considerations like these as an inaccurate account of counsel's actual thinking.").

Here, the reasonable strategic decision was not to present a mental health expert of any type for fear of opening the door to prior incidences of violence. That reasoning applies to Dr. Gomez as well as Dr. Krop. Furthermore, defense counsel White testified at the evidentiary hearing that he would not have presented risk factors in mitigation even if he had been aware of this type of mitigation because Dr. Gomez's report referred to the prior incidences of violence that they were trying to avoid. When defense counsel testifies at an evidentiary hearing that he would not present some mitigation even today and explains why, and that explanation is reasonable, that is also a reasonable strategic decision. Such testimony, even though provided after trial, more that meets the objective standard that is *Strickland*. *Rogers v. Zant*, 13 F.3d 384, 386 (11th Cir. 1994)(explaining that even if many reasonable lawyers would not have done as defense counsel did at trial, no relief can be granted on ineffectiveness grounds unless it is shown that "no reasonable lawyer, in the

circumstances, would have done so."); *Chandler v. United States*, 218 F.3d 1305, 1315 (11th Cir. 2000)(en banc)(stating that the petitioner must establish that "no competent counsel" would have taken the action that his counsel took). It is Carter's burden to establish that every reasonable attorney would have presented this mitigation and he has not done so.

Counsel's performance is not deficient for not presenting a novel type of mitigation that has been presented only in a few recent cases.[7] Not presenting novel or cutting edge evidence does not violate "prevailing professional norms." *Johnson v. State*, -So.3d -, -, 2014 WL 68134, *5 (Fla. 2014)(stating that to establish deficiency under *Strickland*, the defendant must prove that counsel's performance was unreasonable under "prevailing professional norms"); *Strickland*, 466 U.S. at 688, 104 S.Ct. at

[7] There are only a few recent reported capital cases that even refer to this type of mitigation at all. *United States v. Hager*, 721 F.3d 167, 179 (4th Cir. 2013)(referring to jury's findings regarding risk and protective factors in the defendant's childhood as non-statutory mitigation); *United States v. Lighty*, 616 F.3d 321, 360 (4th Cir. 2010)(recounting the mitigation testimony of Dr. Mark Cunningham regarding a Department of Justice (DOJ) study that identified certain risk and protective factors that relate to delinquency and violence);*State v. Payne*, 2013 WL 6252412, 31 (Ariz. 2013)(referring to "risk factors" and "insufficient protective factors"); *Andrews v. Commonwealth*, 699 S.E.2d 237, 276-77 (Va. 2010)(holding that an expert's testimony regarding risk factors versus protective factors based on the DOJ study was proper mitigation). This new trend, if the total of four reported cases nationwide can be termed a trend, seems to have originated with a chapter in a book written by K.L. Salekin, entitled *Capital Mitigation From a Developmental Perspective: The Importance of Risk Factors, Protective Factors, and the Construct of Resilience*, published in the book *Expert Psychological Testimony for the Courts* (M. Costanzo, D. Kraus & K. Pezdek eds) in 2006. The book was published a year *after* Carter's penalty phase.

2065 (stating that the "proper measure of attorney performance remains simply reasonableness under prevailing professional norms."). In *Butler v. State*, 100 So.3d 638, 651 (Fla. 2012), this Court found no deficient performance because, while there was testimony that at the time of Butler's trial it was not uncommon for defense attorneys to employ experts in child competency to evaluate child witnesses, there was no testimony that not presenting such an expert was outside "prevailing professional norms." Here, unlike *Butler*, there is no evidence that risk factors had ever been presented as mitigation in any capital case at the time of Carter's trial in 2005. The few reported opinions referring to this type of mitigation were decided years after Carter's penalty phase. Counsel is not ineffective for not presenting novel mental mitigation, especially when it is not really mental mitigation anyway. There was no deficient performance.

No prejudice established

There was no prejudice either because counsel had a valid reason for not presenting any mental health expert. They were attempting (successfully) to keep the prior incidents of domestic violence and aggravated assaults from the jury. *Taylor*, 120 So.3d at 549-550 (finding no deficient performance because the mental health expert would have testified to damaging information regarding Taylor's antisocial "tendencies."); *Dufour v. State*, 905 So.2d 42, 57 (Fla. 2005)(recognizing that trial counsel is not deficient where he

makes a reasonable strategic decision to not present mental mitigation testimony during the penalty phase because it could open the door to other damaging testimony quoting *Griffin v. State*, 866 So.2d 1, 9 (Fla.2003)). Any mental health expert presented by the defense would be cross-examined regarding the expert's knowledge of these prior arrests by the prosecutor who was aware of the prior arrest. Furthermore, Dr. Gomez characterized Carter as being a sexual deviant based on that incident. (Evid H at 154,157). The price of presenting this type of mitigation was prior violence and sexual deviancy. *Wong v. Belmontes*, 558 U.S. 15, 130 S.Ct. 383, 389-390, 175 L.Ed.2d 328 (2009)(explaining that to correctly gauge prejudice, a court must consider the State's likely rebuttal to the proposed omitted mitigation and finding no prejudice because "the worst kind of bad evidence would have come in with the good" and that the presentation of the mitigation "would have invited the strongest possible evidence in rebuttal."); *Reed v. State*, 875 So.2d 415, 437 (Fla. 2004)(stating that an "ineffective assistance claim does not arise from the failure to present mitigation evidence where that evidence presents a double-edged sword"); *Suggs v. McNeil*, 609 F.3d 1218, 1231 (11th Cir. 2010)(rejecting a claim of ineffectiveness for failing to present mitigation because the "weak evidence of mitigation would have come at a steep price."). As the Florida Supreme Court has repeatedly observed, "trial counsel will not be held to be deficient when she makes a reasonable strategic decision to not present mental mitigation testimony during the penalty phase because it could open the door to other damaging testimony." *Johnson v. State*, 104 So.3d 1010,

1023 (Fla. 2012)(quoting *Gaskin v. State*, 822 So.2d 1243, 1248 (Fla. 2002)).

Counsel seems to be arguing that counsel should have presented the good guy mitigation to the jury but then presented the risk assessment to the judge during the *Spencer* hearing. This type of mitigation would be contradictory to the main theme of a good man who was consumed by jealousy. The mitigation case was that Carter was a good, hard-working man, that committed murder due to his jealousy.

The Florida Supreme Court has rejected the claim that counsel has an obligation to totally change his mitigation tactics at the *Spencer* hearing once he receives a death recommendation from the jury at the penalty phase in *Bradley v. State*, 33 So.3d 664, 679-680 (Fla. 2010). In *Bradley*, counsel presenting Bradley as a man who had overcome his tragic past in the penalty phase in front of the jury. Bradley argued on appeal that his counsel should have then presented different mitigation to the judge during the *Spencer* hearing. The Court noted that the new mitigation portrayed Bradley as violent and abusive, contrary to the mitigation presented to the jury. Bradley argued that there was "nothing left to lose" and that trial counsel had an absolute duty to use all the mental health evidence at his disposal at the *Spencer* hearing. The Florida Supreme Court reasoned that trial counsel had no duty to change his strategy of presenting Bradley as a man who had overcome his tragic past to one depicting him as a deeply scarred, drug-addicted, mentally ill man with a history of rage and panic attacks. The Florida Supreme Court concluded that counsel was not deficient in

making an informed, reasoned, strategic decision to maintain his general mitigation strategy at the *Spencer* hearing. *Bradley*, 33 So.3d at 679-680.

Another problem with this approach is that is the judge is just as likely to find it contradictory to argue Carter as a good person, with an excellent employment history, who committed these murders due solely to jealousy and, then turn around, and argue that he was at risk to be violent regardless of jealousy. A judge would be as likely to notice this contradiction as a jury would be, as the Florida Supreme Court noted in *Bradley*. Inconsistent theories of mitigation are not persuasive to either a jury or a judge.

Post-conviction counsel asserts that a mitigation expert who would testified regarding risk factors but who had not examined Carter would be "persuasive" and convincing to the judge without risking exposure of harmful background information. Dr. Gomez's report contained this information. This also ignores the problem that any mitigation specialist could also open the door. If counsel presents a mitigation specialist and the prosecutor thought for a moment that that presentation was becoming highly persuasive, as postconviction counsel asserts it would be, the prosecutor would then be motivated to present the harmful background information to counter the risk assessment. The prosecutor could present the harmful background information by the simply expedient of calling the ex-wife to testify. The prosecutor and Bill White had gone out to Oklahoma and interviewed or deposed the ex-wife. (Evid H at 276). Counsel testified that the prosecutor was aware of the prior

incidents. Much of that harmful background information was in records that the prosecutor has assess to, such as the Air Force records containing documentation of one prior incident of domestic violent (different from the incident involving the ex-wife). A mitigation specialist or a risk assessment expert, even who limited their testimony to risk assessment, would also open the door.

And this type of testimony could open another door. It could open the door to future dangerousness evidence by the prosecutor as rebuttal. Normally, future dangerousness is improper non-statutory aggravation. *Knight v. State*, 746 So.2d 423, 431, n.10 (Fla. 1998)(observing that future dangerousness nonstatutory aggravating factor does not exist in Florida); *Miller v. State*, 373 So.2d 882, 885 (Fla. 1979)(vacating a death sentence because the trial court used future dangerousness as aggravation). But once a defendant opens the door by presenting mitigating evidence regarding his dangerousness, the prosecutor may rebut that evidence with his own expert and then argue future dangerousness to the jury. *Zack v. State*, 911 So.2d 1190, 1208-09 (Fla. 2005)(explaining that while the future dangerousness can be proper as rebuttal to mitigation). Indeed, here, the prosecutor would not even need to present his own expert because the proposed "mitigation" of risk factors would itself be used to show that Carter was at risk for violence. This mitigation is itself really a form of future dangerousness and future dangerousness is not mitigating. The last thing most defense lawyers want to do is to invite the prosecutor to be allowed to argue future dangerousness to the jury or present

"mitigation" that actually portrays their client as a dangerous, violent person.

Additionally, as the trial court found, much of the risk assessment testimony was cumulative to the testimony of the 27 lay witnesses that were presented. *Wong v. Belmontes*, 558 U.S. 15, 22, 130 S.Ct. 383, 387, 175 L.Ed.2d 328 (2009)(rejecting a claim of ineffectiveness for failing to present expert mental health testimony where "some" of the evidence was "merely cumulative" to that actually presented by counsel); *Lee v. Comm'r, Ala. Dept. of Corr.*, 726 F.3d 1172, 1194-95 (11th Cir. 2013)(finding no prejudice when the omitted mitigation was "largely cumulatively" to that actually presented during the penalty phase citing *Rhode v. Hall*, 582 F.3d 1273, 1287 (11th Cir. 2009)); *Wickham v. State*, 124 So.3d 841, 859 (Fla. 2013)(finding no prejudice where the mitigation evidence presented at the evidentiary hearing was "largely cumulative to that presented during the penalty phase."). Counsel presented Carter's life history to the jury; counsel presented nearly 30 lay witnesses. The same information was conveyed to the jury; it was just presented through lay witnesses rather than experts. Counsel presented the same information as any risk assessment mitigation presentation would have, counsel merely did not present that mitigation within the framework of "risk assessment" via an expert.

This claim of ineffectiveness is nearly identical to that made in *Belmontes* where counsel's strategy was to humanize the defendant by presenting nine lay witnesses to testify regarding his "terrible childhood," only here counsel presented nearly 30 such witness

instead of nine. If counsel in *Belmontes* was not ineffective, Carter's two counsel certainly were not. Indeed, opposing counsel makes the same basic argument - that an expert was necessary to provide "framework" and to link up the mitigation with the crime - that was rejected by the Supreme Court in *Belmontes*. Belmontes argued counsel should have presented a mental health expert to "make connections between the various themes in the mitigation case and explain to the jury how they could have contributed to Belmontes's involvement in criminal activity." *Belmontes*, 558 U.S. at 24, 130 S.Ct. at 388. Opposing counsel attempts to distinguish *Belmontes* arguing that risk factors are complex and beyond the understanding of the average juror but actually they are not. Poverty is not a complex concept beyond the understanding of the average juror. While the label of risk factors maybe new to a juror, the concepts underlying those factors are very familiar to the average juror.

Moreover, the risk factors was not compelling mitigation because it did not account for Carter's life. Carter's age undermines this type of mitigation. Dr. Gomez testified that the two highest risk factors for violence are being male and being 18 to 35 years old. (Evid H at 132). "There is nothing higher that can predict violence than that." (Evid H at 132-133). So, none of the other factors in the risk assessment model is as important as age. Yet, Carter committed these three murders in his late 40's. Carter was 47 years old at the time of the murders. (T. XVI 1490). As Dr. Gomez testified himself at the evidentiary hearing, family factors "tend to fade out when you get older." (Evid H at 113-114). As Dr.

Gomez also testified that “peers are really impactful when you’re an adolescent but they’re not as impactful when you’re 40 years old.” (Evid H at 113). Indeed, the study that postconviction counsel relies upon is entitled “Predictors of Youth Violence.” Dr. Gomez also testified that according to the D.O.J. study those who go to college, their risk for violence goes “way down” and “the more education you have, the less trouble you get in.” (Evid H at 166-168). Carter attended college for three years. The study did not accurately predict Carter’s behavior in terms of either age or education. He had protective factors of both age and education. How compelling can a study be to a jury (or to a judge for that matter) when it does not seem to actually apply to Carter?

Courts do not find prejudice where the proposed mitigation is weak, especially in comparison to strong aggravation. *Schriro v. Landrigan*, 550 U.S. 465, 480-481, 127 S.Ct. 1933, 1944, 167 L.Ed.2d 83 (2007)(finding no prejudice where the proposed mitigation of fetal alcohol syndrome, being raised by an alcoholic adoptive mother, and drug and alcohol abuse was “weak” and of “poor quality” but the aggravation was strong based on the defendant’s “exceedingly violent past”); *Parker v. Sec'y Dep't of Corr.*, 331 F.3d 764, 788-89 (11th Cir. 2003)(finding no prejudice given “the strength of the aggravating factors and the relative weakness of the mitigating evidence”); *Ford v. Hall*, 546 F.3d 1326, 1338 (11th Cir. 2008)(finding no prejudice where there were three statutory aggravating circumstances and the omitted mitigation was not compelling). Indeed, the *Strickland* Court itself found no prejudice because the omitted mitigation “would barely have altered

the sentencing profile presented to the sentencing judge." *Strickland*, 466 U.S. at 700, 104 S.Ct. at 2071.

There was no ineffectiveness from not presenting risk assessment mitigation. Had the risk assessment been presented as mitigation it would not have resulted in a jury recommendation of life or a override by the judge of the jury's recommendation of death. Carter murdered three people including a teenager. Carter's death sentence would have remained a death sentence. There was no prejudice. Accordingly, the trial court properly denied this claim of ineffectiveness.

ISSUE II

WHETHER THE TRIAL COURT PROPERLY DENIED THE CLAIM OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL FOR NOT FILING A MOTION FOR CHANGE OF VENUE? (Restated)

Carter asserts that defense counsels, Public Defender Bill White and Assistant Public Defender Alan Chipperfield, were ineffective for failing to file a motion for change of venue due to the publicity. IB at 39. This claim was abandoned at the evidentiary hearing. Post-postconviction counsel did not introduce any evidence establishing extensive publicity, such as newspaper articles, and asked no question of either counsel regarding the claim despite being granted an evidentiary hearing to explore the claim. Alternatively, the claim is meritless. There was no deficient performance because there was no trouble selecting a jury. As both trial counsel testified at the evidentiary hearing, there was no legal ground to file a motion for change of venue. There was no prejudice either. As the trial court found, any motion for change of venue would have simply been denied.

Jury selection

The final jury panel was Susan Brink; George Cammon; Barbara Pedrazoli; Marilyn Highland; Brian Swallow; Maria Miller; Mary Gasior; Teresa Elmore; Margaret Rusnak, Michael Shields; Dixie Borthwick and James Ayers with alternates Julie Smith and Robert O'Neil. (T. Vol. XIII 808). The alternates, Julie Smith and Robert O'Neil were excused. (T. Vol. XIX 1946,1953).

Several jurors were excused for cause based on their exposure to publicity and stated inability to put that publicity aside. (T.

Vol. X 201-348). Five jurors, 1) George Cammon; 2) Maria Miller; 3) Teresa Elmore; 4) Margaret Rusnak; 5) Dixie Borthwick, had some prior knowledge of the case. (T. Vol. IX 138). These jurors were questioned regarding their knowledge. (T. Vol. IX 138;141;150;153;189-194; Vol. X 209;212;245-246;254;257). All of them assured the trial court that they could be fair. (T. Vol. IX 139-140;151-153; 190; Vol. X 211; 247-248; 251; 253; 255-256; 276-277; 280-281)

Alternate O'Neil knew one of the victims. (Vol. X 277-278). Alternate O'Neil was aware of Carter's flight as well. However, he was excused prior to the jury's deliberations. Neither alternate participated in jury deliberations; both were excused. (T. Vol. XIX 1946,1953).

Evidentiary hearing testimony

Public Defender Bill White testified at the evidentiary hearing that they did not have the "type of pervasive" absorption of the case into the "psyche" of the community to legally justify filing a motion for change of venue. (Evid H at 66). He also testified that as a general rule, absent a circus atmosphere, you must attempt to pick a jury and be unsuccessful, prior to filing a motion to change venue. (Evid H at 66-67). There was no circus atmosphere. (Evid H at 66-67).

Chief Assistant Public Defender Chipperfield testified at the evidentiary hearing that before you can file a motion for change of venue, you need to attempt to pick a jury and in this case "we did pick one." (Evid H at 263). He had not reread the jury selection

but he remembered they asked a lot of questions of the jurors who had heard about the case to make sure they "could be fair and lay aside anything that they knew." They successfully picked a jury in Duval County. (Evid H at 264).

Standard of review

The standard of review for a claim of ineffective assistance of counsel is *de novo*. This Court reviews a postconviction court's rulings on the performance and prejudice prongs of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), *de novo*. *Johnson v. State*, 104 So.3d 1010, 1022 (Fla. 2012). This Court, however, defers to any factual findings made by a postconviction court regarding the claim following an evidentiary hearing due to a trial court' "superior vantage point in assessing the credibility of witnesses and in making findings of fact." *Johnson*, 104 So.3d at 1022.

The trial court's ruling

The trial court denied this claim of ineffectiveness finding both that there was no deficient performance and that there was no prejudice. (PC Vol. 3 652-655). The trial court observed that there was three years between the crime and the trial. (PC Vol. 3 654-655). The trial court also noted that "all of the jurors with prior knowledge of the case stated unequivocally that they had not formed any opinions about the case and could render a fair impartial verdict based solely on the evidence presented at trial." (PC Vol. 3 652-655 (citing T. Vol. IX 139-140;151-153; 190; Vol. X

211; 247-248; 251; 253; 255-256; 276-277; 280-281). The trial court noted that during the evidentiary hearing, retired elected Public Defender Bill White testified that unless there is an overwhelming circus atmosphere, which there was not in this case, defense counsel needs to try to pick a jury before filing a motion for change of venue. (PC Vol. 3 655). The trial court observed that the defendant "did not provide evidence of extensive and/or inflammatory publicity to support his claim." (PC Vol. 3 655).The trial court found no deficient performance because the record demonstrated "that an impartial jury was seated," and therefore, "there were no legal grounds to support such a motion." (PC Vol. 3 655). The trial court also found that because there were no legal grounds to support the motion, if counsel had moved for a change of venue, "the Court would have denied the motion." (PC Vol. 3 655). The trial court concluded that defendant failed "to satisfy either prong of *Strickland*."(PC Vol. 3 655).

Abandonment and failure of proof

Despite being granted an evidentiary hearing, Carter did not produce evidence to support this claim. *Lukehart v. State*, 70 So.3d 503, 518 (Fla. 2011)(finding a postconviction claim failed "for lack of proof" where the defendant was granted an evidentiary hearing on the claim of ineffectiveness for failing to move to suppress based on a local policy issue but failed to present evidence regarding the local policy at the evidentiary hearing). Post-conviction counsel in his motion filed in the trial court referred to numerous reports of this crime that were published.

Motion at 24-26. Post-conviction counsel was required to admit these reports and newspaper articles as evidence at the evidentiary hearing and he did not do so. Indeed, the State's answer to the 3.851 motion warned postconviction counsel that such a claim of ineffectiveness had to be supported by newspaper articles and that there was controlling Florida Supreme Court precedent to that effect. Because the actual articles were not part of the presentation, the claim should be denied. *Dillbeck v. State*, 964 So.2d 95, 104 (Fla. 2007)(rejecting a claim of ineffectiveness for failing to move for a change of venue because "Dillbeck failed to demonstrate a legal basis for filing a motion for change of venue" because "Dillbeck produced no evidence of extensive pretrial publicity (newspaper articles, etc.) in support of this claim."). Here, as in *Dillbeck*, there was no evidence of extensive pretrial publicity presented in support of this claim.

Changes of venue are not granted merely because there was extensive publicity regarding the murder. *Rolling v. State*, 695 So.2d 278 (Fla. 1997)(explaining that pretrial publicity is normal and expected in certain kinds of cases and "that fact standing alone will not require a change of venue"). The *Rolling* Court explained that the trial court must consider numerous factors, such as: 1) the length of time that has passed from the crime to the trial and when, within this time, the publicity occurred; 2) whether the publicity consisted of straight, factual news stories or inflammatory stories; 3) whether the news stories consisted of the police or prosecutor's version of the offense to the exclusion of the defendant's version; 4) the size of the community in

question; and 5) whether the defendant exhausted all of this peremptory challenges in determining whether to grant a motion for change of venue.

Carter did not even attempt to establish any of the *Rolling* factors at the evidentiary hearing. Postconviction counsel did not ask a single question of either trial counsel regarding publicity and change of venue despite being granted an evidentiary hearing to explore this claim of ineffectiveness. All of the evidence regarding this claim was elicited by the prosecutor. This claim of ineffectiveness was abandoned at the evidentiary hearing. *Clark v. State*, 35 So.3d 880, 888 (Fla. 2010)(noting that the defendant presented no evidence to support the claim of ineffectiveness at the evidentiary hearing); *Hartley v. State*, 990 So.2d 1008, 1016 (Fla.2008)(same). This claim of ineffectiveness was abandoned.

Merits

To establish ineffective assistance of counsel, a defendant must establish both deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The defendant must satisfy both the performance and prejudice prongs to show ineffectiveness.

There is a strong presumption that trial counsel's performance was not ineffective. *Pagan v. State*, 29 So.3d 938, 949 (Fla. 2009). "A fair assessment of an attorney's performance 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."

Pagan, 29 So.3d at 949 (quoting *Strickland*, 466 U.S. at 689). Judicial scrutiny of counsel's performance must be highly deferential. "Strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct." *Pagan*, 29 So.3d at 949 (quoting *Occhicone v. State*, 768 So.2d 1037, 1048 (Fla. 2000)). An attorney can almost always be second-guessed for not doing more but that is not the standard. *Id.*

Prejudice means there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. A reasonable probability is a probability sufficient to undermine confidence in the outcome. The strong presumption that counsel's performance was reasonable is even stronger when trial counsel is "particularly experienced." *Reed v. Sec'y, Fla. Dep't. of Corr.*, 593 F.3d 1217, 1244 (11th Cir. 2010)(citing *Chandler v. United States*, 218 F.3d 1305, 1316 & n.18 (11th Cir. 2000)(en banc).

No deficient performance established

There was no deficient performance for not filing a motion for change of venue because as counsel testified there was no legal basis to file a motion for change of venue. *Knight v. State*, 923 So.2d 387, 402 (Fla. 2005)(rejecting a claim of ineffective assistance of counsel for failing to request a change of venue because "there was no legal basis for a change of venue, counsel was not ineffective for failing to request one" where the court

noted there was no difficulty in seating a jury citing *Patton v. State*, 784 So.2d 380, 389-90 (Fla. 2000)). Indeed, this Court has affirmed a summary denial of claim of ineffectiveness for not filing a motion for change of venue when there was no legal basis to do so. *Franklin v. State*, - So.3d -, -, 2014 WL 148578 (Fla. Jan. 16, 2014)(rejecting a claim of ineffective assistance of counsel for failing to request a change of venue "because there was no legal basis for a change of venue").

Knowledge of the incident because of its notoriety is not, in and of itself, grounds for a change of venue. *Anderson v. State*, 18 So.3d 501, 521 (Fla. 2009)(quoting *McCaskill v. State*, 344 So.2d 1276, 1278 (Fla.1977)). The test for determining a change of venue is whether the general state of mind of the inhabitants of a community is so infected by knowledge of the incident and accompanying prejudice, bias, and preconceived opinions that jurors could not possibly put these matters out of their minds and try the case solely upon the evidence presented in the courtroom. *Anderson*, 18 So.3d at 521. Furthermore, "absent an extreme or unusual situation, the need to change venue should not be determined until an attempt is made to select a jury." *Anderson*, 18 So.3d at 521 (citing *Henyard v. State*, 689 So.2d 239, 245 (Fla. 1996)).

Counsels' performance was not deficient for not filing a meritless motion. *Anderson*, 18 So.3d at 521 (finding no ineffective assistance of appellate counsel for failing to raise a change of venue issue because "[g]iven this extensive and meticulous jury selection process, there was no meritorious claim that appellate

counsel could have raised); *Overton v. State*, 976 So.2d 536, 572 (Fla. 2007). Basically, motions for change of venue are losers. *Rolling v. State*, 695 So.2d 278 (Fla. 1997)(holding, despite the "massive pretrial publicity," the trial court did not abuse its discretion in denying a motion to change venue); *Skilling v. United States*, 561 U.S. 358, 130 S.Ct. 2896, 2914, 177 L.Ed.2d 619 (2010)(affirming the conviction of an Enron executive; holding that no presumption of prejudice arose; and explaining that in each of its cases where it had overturned a conviction based on a presumption of prejudice due to publicity, the convictions had been obtained in a trial atmosphere that was "utterly corrupted by press coverage."); *Price v. Allen*, 679 F.3d 1315, 1319-1323 (11th Cir. 2012)(affirming a state court's denial of change of venue in a prosecution for the killing of a minister in a small town and affirming the denial of a claim of ineffectiveness for not filing a motion for change of venue). This is because the presumption of prejudice due to adverse press coverage "attends only the extreme case." *Skilling*, 130 S.Ct. at 2915. There was no real possibility of establishing a presumption of prejudice in Carter's case. Carter's case was not in the same league as cases such as *Rolling*, *Skilling*, or *Price*, yet the courts found no presumption of prejudice in all those cases. Carter's was not the extreme case. Therefore, any motion for change of venue would have been meritless and counsel is not required to file baseless motions to be effective. Indeed, effective counsel refrains from filing baseless motions.

As both trial counsels testified, the legal standard is that it must prove impossible to select a jury and that did not happen, so there was no legal basis to file a motion for change of venue. Thus, there was no deficient performance.

No prejudice established

Nor was there any prejudice because any motion for change of venue would have been denied. To establish prejudice, Carter must establish that the motion for change of venue would have been granted. *Dillbeck v. State*, 964 So.2d 95, 104 (Fla. 2007)(explaining to establish prejudice from defense counsel's failure to move for a change of venue, the defendant must, at a minimum, demonstrate that the trial court would have, or at least should have, granted a motion for change of venue and finding that any motion for change of venue would have been denied and therefore, there was no prejudice); *Cf. Chandler v. McDonough*, 471 F.3d 1360, 1362 (11th Cir. 2006)(observing that it is "difficult for a petitioner claiming his counsel was ineffective for failing to move for a change of venue to establish the requisite prejudice."). To show that the motion should have been granted, Carter must show that there were undue difficulties in selecting an impartial jury. *Franklin v. State*, - So.3d -, -, 2014 WL 148578 (Fla. Jan. 16, 2014)(rejecting a claim of ineffective assistance of counsel for failing to request a change of venue and finding the defendant "failed to demonstrate a legal basis for filing a motion for change of venue" because "there were no undue difficulties in selecting an

impartial jury" citing *Dillbeck v. State*, 964 So.2d 95, 104 (Fla. 2007)); *Dillbeck v. State*, 964 So.2d 95, 104 (Fla. 2007)(rejecting a claim of ineffectiveness for failing to file a motion for change of venue where there were "no undue difficulties in selecting an impartial jury" because the jurors assured the court during voir dire that they could be impartial despite their extrinsic knowledge about the case).

In ruling on a motion for a change of venue, the trial court should consider the following: 1) the extent and nature of any pretrial publicity; and 2) the difficulty encountered in actually selecting a jury. *Overton v. State*, 976 So.2d 536, 572 (Fla. 2007). If during voir dire, the jurors assure the trial court that they could be impartial despite any extrinsic knowledge, then they are proper jurors. The existence of pretrial publicity does not require a change of venue. *Id.* Pretrial publicity should be examined in light of the following factors: 1) when the publicity occurred in relation to the time of the crime and the trial; 2) whether the publicity was made up of factual or inflammatory stories; 3) whether the publicity favored the prosecutions side of the story; 4) the size of the community exposed to the publicity; and 5) whether the defendant exhausted all of his peremptory challenges in seating the jury. *Id.* (citing *State v. Knight*, 866 So.2d 1195, 1209 (Fla. 2003)).

In *Taylor v. State*, 120 So.3d 540, 550-51 (Fla. 2013), this Court recently rejected a claim of ineffective assistance of trial counsel for not filing a motion for change of venue due to pretrial publicity. This Court found no prejudice without addressing the

performance prong. This Court explained that to establish prejudice, a defendant must "bring forth evidence demonstrating that the trial court would have, or at least should have, granted a motion for change of venue." *Taylor*, 120 So.3d at 551 (quoting *Dillbeck v. State*, 964 So.2d 95, 104 (Fla. 2007)). This Court observed that "Taylor failed to demonstrate a legal basis for filing a motion for change of venue" because there "were no undue difficulties in selecting an impartial jury" and therefore, "any motion for change of venue would have been denied." *Taylor*, 120 So.3d at 551. Because the motion for change of venue would have been denied if it had been made, there was no prejudice from trial counsel not filing such a motion.

This case is virtually indistinguishable from *Taylor* regarding the prejudice prong. Carter, like Taylor, "failed to demonstrate a legal basis for filing a motion for change of venue" because there "were no undue difficulties in selecting an impartial jury" and therefore, "any motion for change of venue would have been denied." Here, as in *Franklin*, *Taylor*, and *Dillbeck*, there was no prejudice and for the same reason.

Actual bias required

Opposing counsel in his brief to this Court states that although the trial court said that an impartial jury was selected, "this Court must rely on the overwhelming amount of publicity, rather than a juror's assurances that he or she would remain impartial throughout the trial." IB at 49. This statement is not supported

by any citation and is contrary to both United States Supreme Court and Florida Supreme Court precedent. In the United States Supreme Court's words, prominence "does not necessarily produce prejudice" and juror impartiality "does not require ignorance." *Skilling*, 130 S.Ct. at 2914-15 (citation omitted). Publicity itself is not the standard for granting a motion for change of venue and assurances by the jurors that they will decide the case based on the evidence presented in court, not press accounts, is indeed what this Court relies upon in affirming denials of motions for change of venue. *Larzelere v. State*, 676 So.2d 394, 406 (Fla. 1996)(affirming the denial of a change of venue motion because, although "many of the prospective jurors had read or heard media reports about the murder," . . . "the jurors' knowledge of the incident was not such that it caused them to form any prejudicial, preconceived opinions about the case); *Pietri v. State*, 644 So.2d 1347, 1351-52 (Fla. 1994)(affirming the denial of a change of venue motion, explaining that even if "a juror has knowledge about a case, it is sufficient if the juror can lay aside his or her impression or opinion and render a verdict based on the evidence presented in court" quoting *Irvin v. Dowd*, 366 U.S. 717, 723, 81 S.Ct. 1639, 1642, 6 L.Ed.2d 751 (1961), where "the trial judge excused members of the venire who said they were biased" and those jurors who read about the case "all said they could set aside any prior knowledge and decide the case based on evidence presented at trial."). That courts look for the jurors' assurances of impartiality rather than newspaper clippings or blogs is clear from the full quote of the case opposing counsel partially quotes. *Provenzano v. State*, 497 So.2d

1177, 1182 (Fla. 1986). The full quote is that "pretrial publicity is expected in a case such as this, and, standing alone, does not necessitate a change of venue;" rather, "[t]he critical factor is the extent of the prejudice or lack of impartiality among potential jurors that may accompany the knowledge of the incident." *Provenzano*, 497 So.2d at 1182. Opposing counsel's argument is really an assertion that any time there is publicity, a presumption of prejudice should arise but the United states Supreme Court has held that the presumption arises only in the "extreme" case. *Skilling*, 130 S.Ct. at 2915. In any case other than the extreme case, looking for the jurors' assurances of impartiality is exactly what courts do.

While Carter points to the jurors who knew about the case, he does not point any juror that did not assure the trial court that he or she could be fair and impartial. IB at 43-45 & n.20.[8] No biased juror sat on this jury. The trial court excused those prospective jurors who did not assure him that their prior knowledge would not influence their verdict, retaining only those prospective jurors who could assure him that they could set aside any prior knowledge and decide the case based on evidence presented at trial. T. Vol. IX 139-140;151-153; 190; Vol. X 211; 247-248;

[8] Carter refers to juror O'Neil. IB at 45. Robert O'Neil was not a juror; he was one of the alternates. Neither alternate participated in jury deliberations; both were excused. (T. Vol. XIX 1946,1953). One may not premise a claim of a biased jury based on an alternate juror who was excused and never decided the defendant's fate. *United States v. Lawrence*, 735 F.3d 385, 442 (6th Cir. 2013)(stating that "any possibility that bias influenced the jury was removed when the alternate juror was excused."). Only actual jurors matter.

251; 253; 255-256; 276-277; 280-281. The five juror's assurances that they were not biased negates this claim of a biased jury and the claim of ineffectiveness that it is premised upon.

This Court, in the postconviction context, requires that the defendant establish that an actually biased juror served. *Cf. Carratelli v. State*, 961 So.2d 312, 324 (Fla. 2007)(holding that where "a postconviction motion alleges that trial counsel was ineffective for failing to raise or preserve a cause challenge, the defendant must demonstrate that a juror was actually biased."). As this Court has explained, in a related but slightly different context, "if a lawyer's error did not result in the seating of a biased juror, then postconviction relief on the basis of the lawyer's alleged ineffectiveness is not appropriate." *Merck v. State*, 124 So.3d 785, 795 (Fla. 2013)(citing *Carratelli*, 961 So.2d at 324). While *Carratelli* concerned a claim of ineffectiveness for failing to strike a juror, the same requirement should apply to claims of ineffectiveness for failing to move for a change of venue. These types of claims of ineffectiveness are closely related and both should require a showing that an actually biased juror decided the case. So, regardless of the difficulty in selecting a final jury, in the postconviction context, provided twelve unbiased jurors served, any claim of ineffectiveness for not filing a motion for change of venue should be rejected.

Accordingly, the trial court properly denied the claim of ineffectiveness for not filing a motion for change of venue.

CONCLUSION

The State respectfully requests that this Honorable Court affirm the trial court's denial of post-conviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF has been furnished by email via the e-portal to FRANK J. TASSONE, TASSONE & DREICER, LLC., 1833 Atlantic Blvd., Jacksonville, FL 32207 frank@tassonelaw.com this 17th day of January, 2014.

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CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New 12.

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