Electronically Filed 11/12/2013 12:59:34 PM ET

RECEIVED, 11/12/2013 13:03:35, John A. Tomasino, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC13-1076

LOWER TRIBUNAL NO. 16-2004-CF-730

PINKNEY CARTER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

INITIAL BRIEF OF APPELLANT

FRANK J. TASSONE
Fla. Bar No. 165611
TASSONE & DREICER, LLC.
1833 Atlantic Blvd.
Jacksonville, FL 32207
(904) 396-3344
Fax (904) 396-3349

TABLE OF CONTENTS

PAGE(S)

Table of Citations.....iv

Statement of the Case and Facts 1

Summary of the Argument.....4

Standard of Review.....6

The Strickland Standard.....7

Argument 9

I. THE TRIAL COURT ERRED IN CONCLUDING THAT TRIAL COUNSEL DID NOT RENDER INEFFECTIVE ASSISTANCE BY FAILING TO CALL A MENTAL HEALTH EXPERT DURING THE PENALTY PHASE OR SPENCER HEARING TO ESTABLISH THE EXISTENCE OF TWO STATUTORY MITIGATORS, DISPROVE ONE STATUTORY AGGRAVATOR, AND PUT MR. CARTER'S NON-STATUTORY MITIGATORS IN A PROPER PSYCHOLOGICAL FRAMEWORK..... 9

A. Deficient Performance.....11

1. Counsel's Decision Not to Have a Mental Health Expert Testify During Mr. Carter's Penalty Phase Was Not "Strategy".....12

2. Counsel Was Deficient in Failing to Use a Mental Health Expert to Argue for Two Statutory Mitigators and Disprove One Statutory Aggravator.....15

3. Counsel Was Deficient in Failing to Link the Traumatic Events of Mr. Carter's Upbringing to the Facts and Circumstances of the Crime.....19

B. Prejudice 20

1. Summary of Dr. Gomez's Findings Regarding Mr. Carter's Neurological Health and the Effects of Risk and Protective Factors on Mr. Carter's Life 21

2. A Mental Health Expert's Testimony About Risk and Protective Factors Would Have Established Two Statutory Mitigating Factors and Disproved One Statutory Aggravating Factor 26

3. Even if the Negative Evidence of Mr. Carter's Past Crimes Came Out in Front of the Jury, Mr. Carter Would Have Received a Life Sentence.....29

4. If Counsel Presented a Mental Health Expert at Penalty Phase to Testify About the Risk and Protective Factors, Mr. Carter Would Have Received a Life Sentence 31

II. THE TRIAL COURT ERRED IN DENYING MR. CARTER'S CLAIM THAT TRIAL COUNSEL WAS DEFICIENT IN FAILING TO MOVE FOR A CHANGE OF VENUE, THEREBY PREJUDICING MR. CARTER BY PROHIBITING HIM FROM SELECTING AN IMPARTIAL JURY 39

A. Mr. Carter's Crimes Were Heavily Publicized Both Locally and Nationally, and Seven Jurors in Mr. Carter's Case Had Knowledge of Mr. Carter's Case Before Trial.....40

B. Mr. Carter Was Prejudiced by Counsel's Failure to Move for a Change of Venue Because the Pre-Trial Publicity Was Extensive and Inflammatory and There Was Great Difficulty in Selecting an Impartial Jury 46

Conclusion 50

TABLE OF CITATIONS

Cases

Blackwood v. State,
946 So. 2d 960 (Fla. 2006) 16

Bradley v. State,
33 So. 3d (Fla. 2010) ..... *passim*

Carter v. Florida,
555 U.S. 947 (2008) 4

Carter v. State,
560 So. 2d 1166 (Fla. 1990) 32

Carter v. State,
980 So. 2d 473 (Fla. 2008). ..... *passim*

Dillbeck v. State,
964 So. 2d 95 (Fla. 2007) 47

Foster v. State,
778 So. 2d 906 (Fla. 2001) 47

Franklin v. State,
965 So. 2d 79 (Fla. 2007) 28

Green v. State,
975 So. 2d 1081 (Fla. 2008) 32

Griffin v. State,
866 So. 2d 1 (Fla. 2003) 46, 48

Hannon v. State,
941 So. 2d 1109 (Fla. 2006) 21

Hildwin v. State,
84 So. 3d 180 (Fla. 2011) 31

Hurst v. State,
18 So. 3d 975 (Fla. 2009) ..... *passim*

Jackson v. State,
648 So. 2d 85 (Fla. 1994) 28

Manning v. State,
378 So. 2d 274 (Fla. 1979) 47

Melton v. State,
638 So. 2d 927 (Fla.1994) 16

Mendoza v. State,
700 So. 2d 670 (Fla.1997) 16

Michel v. Louisiana,
350 U.S. 91 (1955) 12

Occhione v. State,
768 So. 2d 1037 (Fla. 2000). 12

Philips v. State,
984 So. 2d 503 (Fla. 2008). 24

Porter v. McCollum,
558 U.S. 30 (2009) 31

Provenzano v. State,
497 So. 2d 1177 (Fla. 1986) 46

Rolling v. State,
695 So. 2d 278 (Fla. 1997) 46

Rose v. State,
675 So. 2d 567 (Fla. 1996) 26, 33

Sears v. Upton,
130 S. Ct. 3259 (2010) 30

Shellito v. State,
701 So. 2d 837 (Fla. 1997) 16

Sims v. State,
602 So. 2d 1253 (Fla. 1992). 8

Sochor v. State,
883 So. 2d 766 (Fla. 2004) 6, 21

State v. Dixon,
283 So. 2d 1 (Fla. 1973) 33

Stewart v. State,
37 So. 3d 243 (Fla. 2010) 31

Strickland v. Washington,
466 U.S. 688 (1984) .....*passim*

Terry v. State,
668 So. 2d 954 (Fla. 1996) 33

Walker v. State,
88 So. 3d 128 (Fla. 2012). 13

Wike v. State,
813 So. 2d 12 (Fla. 2002) 47

Wong v. Belmontes,
558 U.S. 15 (2009) .....*passim*

Florida Statutes

§ 921.141, Fla. Stat. (2013). .....*passim*

Other Authorities

1 *Samuel* 17 17

Art. I, §16, Fla. Const.. .....16, 39

Bill Hewitt, *Beyond the Law: The Prime Suspect in a Triple Homicide,Chip Carter Dodges Justice by Hiding in Mexico*, PEOPLE MAGAZINE, Nov. 10, 2003, *available at* http://www.people.com/people/archive/article/0,,20148580.htm 42

Def.'s Mot. To Vacate J. and Sentence 39

Evidentiary Hr'g Vol. I .....*passim*

Evidentiary Hr'g Vol. II .....*passim*

Jacksonville Fugitive Case to be Revisited in Television Special: The Search for Pinkney Carter, FEDERAL BUREAU OF INVESTIGATION 42

Letter from Dr. Harry Krop to Al Chipperfield, Esq. Regarding Neuropsychological Evaluation of Pinkney Carter (Oct. 27, 2004) (on file with undersigned counsel). 12

Order Den. Def.'s Mot. For Postconviction Relief .....*passim*

Season 17, Episode 15, AMERICA'S MOST WANTED (Jan. 17, 2004), http://www.tvmuse.eu/tv-shows/America-s-Most-Wanted_12211/season_17/episode_15/**.** 42

Suspect in triple slaying captured, THE SARASOTA HAROLD TRIBUNE via THE ASSOCIATED PRESS, Jan. 7, 2004, http://new.google.com/newspapers?nid=1755&dat=20040107&id=kvQeAAAAIBA&sjid=0IQEAAAAIBA&pg=5265,1581543.....42

U.S. Const. Amend. VI, U.S. Const. 10

U.S. Const. Amend. XIV, U.S. Const.. 10

STATEMENT OF THE CASE AND FACTS

Pinkney Carter ("Mr. Carter") was indicted on January 15, 2004, for three counts of first-degree murder for the deaths of Glen Pafford, Elizabeth Reed, and Courtney Smith. Carter v. State, 980 So. 2d 473, 479 (Fla. 2008). Though the crime occurred in July of 2002, Mr. Carter was not arrested until January 2004, and he was not brought to trial until September of 2005. (Order Den. Def.'s Mot. for Postconviction Relief 1).[1] The crime caused a stir in the local community and gained national attention as well. A jury found Mr. Carter guilty of all three counts of murder on September 27, 2005. Carter, 980 So. 2d at 479. Mr. Carter's trial attorneys were Alan Chipperfield and William White, both of the Duval County Public Defender's Office at the time. (Evidentiary Hr'g Vol. I 18-19; Evidentiary Hr'g Vol. II 241-42).[2]

At sentencing, trial counsel called twenty-seven mitigation witnesses to testify on Mr. Carter's behalf. (Order 31). Of these twenty-seven witnesses, only *four* offered testimony about Mr. Carter's terrible childhood and family struggles. Id. at 31-32. The remaining twenty-three mitigation witnesses testified to Mr. Carter's good character as part of trial counsel's attempt to portray Mr. Carter as a

[1] References to the circuit court's Order Denying Defendant's Motion for Postconviction Relief will hereafter be cited to "Order [page]."
[2] References to the two volumes of the Evidentiary Hearing will hereafter be referred to as "Hr'g Vol. I" and "Hr'g Vol. II."

"good guy who did a horrible thing." (Order 32-33; Hr'g Vol. II 246). Though these witnesses testified to Mr. Carter's ability to interact positively with his peers and his involvement in different activities, they provided no testimony about Mr. Carter's upbringing, nor did they provide any testimony to argue for statutory mitigation. (Order 32-33). Trial counsel did not call a mental health expert during the penalty phase. (Hr'g Vol. II 245).

The jury recommended a death sentence for Mr. Carter by a 9-3 vote for the death of Elizabeth Reed; 8-4 vote for the death of Glenn Pafford; and a life sentence for the death of Courtney Smith. Carter, 980 So. 2d at 479. The trial court permitted the State and defense to present additional evidence and argument at a Spencer hearing held on November 21, 2005.[3] (Hr'g Vol. II 250). Trial counsel again failed to call a mental health expert to testify on Mr. Carter's behalf. Id. The State argued for—and the trial court assigned great weight to—the following three statutory aggravating factors: (1) the Defendant has previously been convicted of another capital felony or of a felony involving the use or threat of violence to the person; (2) the capital felony was committed while the Defendant was engaged in the commission of the crime of burglary; and (3) the capital felony was a homicide and was committed in a cold, calculated, and premeditated ("CCP) manner.

[3] See Spencer v. State, 615 So. 2d 688, 691 (Fla. 1993) (holding that the trial court should conduct a hearing to allow the parties to be heard, including the defendant in person, and to allow presentation of additional evidence before sentencing).

§ 921.141(5), Fla. Stat. (2013). The defense did not present any statutory mitigating factors. (Hr'g Vol. II 245). Despite being confronted with the strength of these aggravating factors, trial counsel only requested fifteen *non-statutory* mitigating factors.[4] The trial court found that each of these factors were proven, but only gave "some weight" to each factor, and also gave some weight to three additional non-statutory mitigators. Carter v. State, 980 So. 2d at 479. In contrast, the court gave *great weight* to each of the three statutory aggravating factors. Id. The trial court sentenced Mr. Carter to death on December 22, 2005. (Order 2).

---

[4] The non-statutory mitigating factors presented by counsel were: (1) the Defendant was raised in a broken home with a deprived childhood, but he was able to rise above it and become successful as a high school student and as an adult; (2) the Defendant was an above-average achiever in high school, junior college, and college; (3) the Defendant was elected president of a prestigious majors club on campus at Oklahoma State University and worked with that club to help others; (4) the Defendant enlisted and had a distinguished military record in the United States Air Force for almost four years; (5) the Defendant has been a good employee for many years. He has a consistent work record from a very young age and has also been a supervisor over other people; (6) the Defendant has been a good son to both his father and mother in spite of the fact that his father abandoned him as a child. He had the strength to reconcile with his father when he became an adult; (7) the Defendant has been a good brother to Steve Carter, Mike Carter, and Cindy Starling, and he protected Ms. Starling during their early years; (8) the Defendant saved a child's life when he was working as a lifeguard in Georgia; (9) the Defendant has been a loyal friend to many people and made friends easily; (10) the Defendant has formed an especially close relationship with his nephew, Jacob; (11) the Defendant worked for a living in Kentucky while he was avoiding the police after committing this offense; (12) the Defendant has the potential to be a productive inmate (this is demonstrated by the way he acted towards other inmates in the Duval and by his work record); (13) the Defendant has the support of his family and friends who continue to love him; (14) society can be protected by life sentences without parole; (15) the Defendant offered to plead guilty as charged for three consecutive life sentences.

This Court affirmed Mr. Carter's convictions and sentences on direct appeal. Carter , 980 So. at 473. The United States Supreme Court then denied certiorari, which made Mr. Carter's convictions final. Carter v. Florida, 555 U.S. 947 (2008).

Mr. Carter moved to vacate his conviction and sentence on October 13, 2009, and the State filed its response on December 21, 2009. (Order 1). After Mr. Carter filed his Amended Motion to Vacate Judgments of Conviction and Sentence and the State filed its Answer, the court held an evidentiary hearing on Claims One, Three, Four, part of Claim Five, and Claim Nine on August 1, 2012 and September 24, 2012. (Order 3-4). At the hearings, undersigned counsel called both of Mr. Carter's trial attorneys and Dr. Francisco Gomez, a clinical forensic and neuropsychologist.[5] After both the State and Mr. Carter filed post-evidentiary hearing memorandums, the circuit court denied Mr. Carter's claim for postconviction relief on March 28, 2013.

SUMMARY OF THE ARGUMENT

This appeal addresses two issues: (1) the trial court's error in concluding that trial counsel did not render ineffective assistance for failing to call a mental health expert during the penalty phase or Spencer hearing; and (2) the trial court's error in denying Mr. Carter's claim that trial counsel was deficient for failing to move for a change of venue. The trial court erred in concluding that trial counsel

[5] See infra Part I.B.1 for a summary of Dr. Gomez's testimony from the Evidentiary Hearing.

did not render ineffective assistance by failing to call a mental health expert during the penalty phase or Spencer hearing because testimony from a mental health expert would have established the existence of two statutory mitigators, disproved one statutory aggravator, and placed Mr. Carter's non-statutory mitigators in a proper psychological framework.

Though the Strickland standard protects strategic decisions made by trial attorneys, Mr. Carter's trial counsel never considered presenting a clinical forensic neuropsychologist to testify about the effect of risk and protective factors on Mr. Carter—despite being aware that the State was going to argue three statutory aggravating factors at the penalty phase. A mental health expert's testimony would have shown that Mr. Carter committed the capital felonies while "under the influence of extreme mental or emotional disturbance," and that Mr. Carter's capacity to "appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired." Further, a mental health expert's testimony would have disproved the statutory aggravator of CCP murder. However, Mr. Carter's trial counsel instead presented weak, non-statutory mitigation that gave Mr. Carter no chance of a life sentence. This Appeal, in order to show what a mental health expert's testimony would have consisted of at Mr. Carter's penalty phase, summarizes the testimony from last year's Evidentiary Hearing of Dr. Francisco Gomez, an expert in risk and protective factors. Had Mr.

Carter's trial counsel presented this expert testimony at Mr. Carter's penalty phase or Spencer hearing, Mr. Carter would have received a life sentence. Therefore, Mr. Carter was prejudiced by his counsel's deficient performance in failing to present a mental health expert.

Further, the trial court erred in denying Mr. Carter's claim that trial counsel was deficient in failing to move for a change of venue, thereby prejudicing Mr. Carter by prohibiting him from selecting an impartial jury. The deaths of the three victims in this case caused a commotion in the local community, and Mr. Carter's subsequent flight from authorities to Mexico, release from a Mexican prison, time on the FBI's Most Wanted list, and eventual capture caused a commotion in the national community. In fact, several jurors in Mr. Carter's case testified that they had previous knowledge of Mr. Carter's case that was seen on television. Thus, Mr. Carter's trial attorneys were deficient in failing to move for a change of venue, and Mr. Carter was prejudiced because he did not receive a constitutionally guaranteed fair trial in front of an impartial jury.

STANDARD OF REVIEW

The performance and prejudice prongs of Strickland are mixed questions of law and fact, and the circuit court's legal conclusions are subject to *de novo* review standard. Sochor v. State, 883 So. 2d 766, 771-72 (Fla. 2004).

INEFFECTIVE ASSISTANCE OF COUNSEL – THE *STRICKLAND* STANDARD

The purpose of the constitutional guarantee to effective assistance is to ensure that criminal defendants receive a fair trial. Strickland v. Washington, 466 U.S. 688, 689 (1984). To establish ineffective assistance of counsel, the defendant must satisfy both prongs of the test outlined in Strickland. A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or setting aside of a death sentence requires the defendant to show that: (1) counsel's performance was deficient, and (2) counsel's deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. Id. at 669. Unless a defendant satisfies both prongs, it cannot be said that the conviction or sentence of death resulted from a breakdown of the adversary process that renders the result unreliable. Id.

In order to show that counsel's performance was *deficient*, the defendant is required to prove that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Id. at 687 (emphasis added). In determining whether performance was deficient, courts ask whether the attorney's performance was reasonable considering all the circumstances. Id. at 688. Further, "a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Id. at 690. The

defendant must also overcome the presumption that counsel's actions, which are challenged as deficient, might be considered sound trial strategy under the circumstances. Id. at 691.

To prove he or she was *prejudiced* by counsel's deficient performance, the defendant must show that counsel's errors were "so serious as to deprive the defendant of a fair trial, a trial whose result is unreliable." Id. at 687 (emphasis added). In challenging a death sentence, the question is whether there is a reasonable probability that, absent counsel's errors, "the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Id. at 695. A "reasonable probability" is not of an absolute certainty, but a probability sufficient to undermine confidence in the outcome. Sims v. State, 602 So. 2d 1253 (Fla. 1992). Although some errors will have had an "isolated trivial effect," some errors will have had a "pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture . . . ." Strickland, 466 U.S. at 695-96.

ARGUMENT

I. THE TRIAL COURT ERRED IN CONCLUDING THAT TRIAL COUNSEL DID NOT RENDER INEFFECTIVE ASSISTANCE BY FAILING TO CALL A MENTAL HEALTH EXPERT DURING THE PENALTY PHASE OR SPENCER HEARING TO ESTABLISH THE EXISTENCE OF TWO STATUTORY MITIGATORS, DISPROVE ONE STATUTORY AGGRAVATOR, AND PUT MR. CARTER'S NON-STATUTORY MITIGATORS IN A PROPER PSYCHOLOGICAL FRAMEWORK

At Mr. Carter's penalty phase, defense counsel presented twenty-seven mitigation witnesses to testify on Mr. Carter's behalf. (Order 31). Of these twenty-seven witnesses, only four offered insight into Mr. Carter's difficult past. Id. at 31-33. The remaining twenty-three witnesses testified to Mr. Carter's good character, as part of defense counsel's portrayal to the jury that Mr. Carter was a "good guy who did a horrible thing." (Hr'g Vol. II 246). Defense counsel did not attempt to prove any statutory mitigating factors, and did not call any mental health experts to testify on Mr. Carter's behalf. Id. at 245. The State argued for—and the court subsequently found—*three* statutory aggravating factors. (Order 2).

The circuit court erred in finding that trial counsel was not ineffective under Strickland when trial counsel failed to present available mental mitigation at Mr. Carter's penalty phase or Spencer hearing in the form of "risk and protective factors." Counsel could have used an expert's testimony to support two statutory mitigating factors: (1) Mr. Carter committed the capital felonies while "under the influence of extreme mental or emotional disturbance;" and (2) Mr. Carter's

capacity to "appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired." See § 921.141(6)(b), (f). Further, counsel could have used this testimony to disprove the statutory aggravating factor of CCP murder. See § 921.141(5)(i).

Finally, a mental health expert's analysis of Mr. Carter's risk and protective factors could have put the non-statutory mitigators presented by counsel into a "proper framework" in order to provide a scientific explanation for how and why a good person would commit such horrible acts. Though defense counsel presented some testimony about Mr. Carter's unfortunate childhood, counsel did not provide a *nexus* to the jury to link the effect that Mr. Carter's horrible upbringing had on his mental state and personality, and, consequently, his crimes. Defense counsel presented a wealth of evidence to show that Mr. Carter was a good person, but failed to put a mental health expert on the stand to provide a *scientific explanation* for how such a good person could commit such crimes.

Mr. Carter was denied the right to effective assistance of counsel that is guaranteed under the Sixth and Fourteenth Amendments of the United States, and Article One, Section Sixteen of the Florida Constitution. See U.S. Const. Amend. VI, XIV, U.S. Const.; Art. I, §16, Fla. Const. Therefore, the circuit court erred in finding that Mr. Carter was not denied effective assistance of counsel when his

counsel failed to present a clinical forensic neuropsychologist to testify about Mr. Carter's risk and protective factors.

A. DEFICIENT PERFORMANCE

Mr. Carter's trial counsel was deficient under Strickland for failing to use a mental health expert to testify about risk and protective factors. Though counsel presented witness testimony about Mr. Carter's horrible childhood, counsel did not present an expert to properly explain Mr. Carter's experiences and neurological impairment during penalty phase. Further, counsel never considered presenting an expert to testify about Mr. Carter's risk and protective factors, so failing to present such an expert was not "sound trial strategy" protected under Strickland, 466 U.S. at 691.

Additionally, counsel presented Mr. Carter as a "good guy who did a horrible thing" during penalty phase despite knowing that the State was arguing for three statutory aggravators. Counsel should have been aware of—or simply disregarded—the vast amount of case law illustrating the strength of statutory aggravating factors and statutory mitigating factors in death penalty cases, and counsel chose to present non-statutory mitigation that gave Mr. Carter no likelihood of a life sentence.

1. Counsel's Decision Not to Have a Mental Health Expert Testify During Mr. Carter's Penalty Phase Was Not "Strategy"

Defense counsel had a mental health expert conduct a mental evaluation of Mr. Carter, which revealed neurological impairment and insight into the scientific effect of Mr. Carter' traumatic childhood on his life. Letter from Dr. Harry Krop to Al Chipperfield, Esq. Regarding Neuropsychological Evaluation of Pinkney Carter (Oct. 27, 2004) (on file with undersigned counsel). Despite this, counsel opted against having a mental health expert testify about these findings for two reasons: (1) counsel did not think the findings from the evaluation would "be that helpful" to them; and (2) counsel thought cross-examination of the mental health expert would most likely reveal an incident with Mr. Carter's ex-wife that counsel thought would be harmful to Mr. Carter in the eyes of the jury and the court.[6] (Hr'g Vol. I 22-26).

Though sometimes trial counsel's challenged action might be considered "sound trial strategy," Michel v. Louisiana, 350 U.S. 91 (1955), alternate courses must be considered and rejected in order to be protected from an ineffective assistance of counsel claim. Occhione v. State, 768 So. 2d 1037, 1048 (Fla. 2000). The State might argue that the decision not to use testimony of a mental health

[6] Mr. Carter acted out a sexual fantasy of his with his ex-wife (they were separated at the time) by arriving to her house uninvited and having sexual intercourse with her with a mask on. She did not know it was him until 30 minutes later. (Hr'g Vol. I 154). Mr. Carter was also charged with aggravated assault after a fight in a pool hall. Id. at 155-56.

expert was "strategic," but both Mr. Chipperfield and Mr. White admitted they did not consider acquiring a mental health expert to specifically identify risk and protective factors in Mr. Carter's life in order to explain to the jury how risk and protective factors affect individuals. (Hr'g Vol. I 47, 78; Vol. II 251). Under Occhione, a mental health expert's analysis of risk and protective factors was not "an alternative considered and rejected" by defense counsel; therefore, counsel's decision not to call such an expert cannot be considered "strategic." Further, "counsel's failure to attempt to obtain reasonably available mitigating evidence from available sources precludes the State's argument that counsel reasonably chose against advancing the potentially detrimental testimony presented at the evidentiary hearing." Walker v. State, 88 So. 3d 128, 141-42 (Fla. 2012).

Though the circuit court incorrectly believed that expert testimony on risk and protective factors was part of counsel's strategic calculation because counsel actually "considered those factors when gathering mitigation and those factors were alluded to . . .", the court missed the meaning of risk and protective factors. (Order 35). Though counsel presented some testimony about Mr. Carter's troubling childhood, counsel provided no testimony regarding Mr. Carter's neurological issues, and counsel admitted that they did not consider putting Mr. Carter's mitigation into a framework to provide a scientific explanation for his actions.

(Hr'g Vol. II 273-74). An expert's testimony on risk and protective factors would have provided this framework.

Counsel considered presenting a mental health expert to testify about Mr. Carter's past experiences and neurological impairment, but counsel rejected this idea because a mental health expert would have revealed "negative information." (Hr'g Vol. I 50). Counsel was deficient because they ended the inquiry here—expert testimony about risk and protective factors was available. Dr. Gomez had been testifying about risk and protective factors for five years prior to Mr. Carter's penalty phase, and the Department of Justice released their initial report on risk and protective factors in 1993.[7] (Hr'g Vol. I 115, 146). Defense counsel's failure to utilize a mental health expert to testify to Mr. Carter's risk and protective factors during the penalty phase cannot be considered "sound trial strategy" because defense counsel did not consider this method of approach.

Further, even if counsel believed that allowing negative information to come out before the jury would harm the mitigation theory that Mr. Carter was a "good guy who did a horrible thing," (Hr'g Vol. II 246), counsel was deficient for failing to present mental mitigation at the Spencer hearing. (Hr'g Vol. II 245). Having been found guilty of three counts of first-degree murder, there is no reasonable

[7] Counsel testified that he was aware of the Department of Justice's study, but could not remember whether he knew about the study at the time of Mr. Carter's penalty phase. Hr'g Vol. I 29.

explanation—and it certainly was not strategy—to not present a mental health expert's testimony at the Spencer hearing. See Hurst v. State, 18 So. 3d 975, 1013 (Fla. 2009) (holding that "even if counsel did not want to present mental mitigation to the jury because of concerns relating to credibility or inconsistency, there is no explanation how presenting such mitigation at the Spencer hearing would have been detrimental."). Given that Mr. Carter was convicted of three counts of first-degree murder, counsel's failure to present powerful mental mitigation at the Spencer hearing out of fear that Mr. Carter's past crimes would negatively influence the judge was outside the bounds of constitutionally sufficient representation.

2. Counsel Was Deficient in Failing to Use a Mental Health Expert to Argue for Two Statutory Mitigators and Disprove One Statutory Aggravator

At the penalty phase of Mr. Carter's trial, the State requested three aggravating factors: (1) the Defendant has previously been convicted of another capital felony or of a felony involving the use or threat of violence to the person; (2) the capital felony was committed while the Defendant was engaged in the commission of the crime of burglary; and (3) the capital felony was a homicide and was committed in a cold, calculated, and premeditated manner. § 921.141(5). Defense counsel was aware of the State's intent to prove three statutory aggravating factors, yet counsel requested non-statutory mitigation. (Hr'g Vol. I 40).

An attorney's failure to find and present statutory and non-statutory mental mitigation in the penalty phase of a capital trial may constitute deficient performance. See Blackwood v. State, 946 So. 2d 960 (Fla. 2006) (finding deficient performance when counsel failed to present a mental health mitigation witness who established the statutory mitigator that defendant suffered an extreme emotional disturbance at the time of the crime, as well as a number of non-statutory mental mitigators).

Further, this Court has repeatedly shown that there is no likelihood of a capital defendant receiving a life sentence when that defendant only offers non-statutory mitigation while the State argues for multiple statutory aggravating factors. See e.g., Shellito v. State, 701 So. 2d 837, 845 (Fla. 1997) (finding death sentence proportionate when defendant had prior violent felony conviction, was on probation at the time he committed the murder, had committed three robberies and an aggravated assault on a police officer days before the murder, and defendant had non-statutory mitigators of age, background, and character); Mendoza v. State, 700 So. 2d 670, 679 (Fla.1997) (concluding that death sentence was proportionate for twenty-five-year-old defendant when the court found two aggravators of prior violent felony conviction and pecuniary gain and gave little weight to defendant's history of drug use and mental health problems); Melton v. State, 638 So. 2d 927, 930–31 (Fla. 1994) (finding death sentence was proportionate when murder

involved two aggravators of prior violent felony conviction and pecuniary gain and two non-statutory mitigators of the defendant's good conduct in jail and difficult family background).

Defense counsel's presentation of non-statutory mitigation to try and convince the jury that Mr. Carter—whom they had just convicted of three counts of first-degree murder—was a "good guy," to counter the State's three statutory aggravating factors, was akin to David confronting Goliath without a slingshot and stone. 1 *Samuel* 17. A clinical forensic neuropsychologist would have identified risk and protective factors in Mr. Carter's life, put Mr. Carter's experiences and neurological impairment into a proper framework, and offered a scientific explanation for Mr. Carter's actions—including the incident that trial counsel tried to conceal. Further, a clinical forensic neuropsychologist's findings on risk and protective factors would have easily produced an argument for two statutory mitigating factors to be inescapably clear. Dr. Gomez was forthright when asked whether Mr. Carter was under the influence of an extreme emotional disturbance (§ 921.141(5)(b)) when he committed the murders.

> [Y]es. I mean he's got underlying neurological impairment. He was abusing alcohol. He was depressed . . . [and] hadn't been sleeping. He's in a situation which is highly emotionally charged, a woman that he's been with for a while is leaving him . . . .

(Hr'g Vol. I 139-40). Dr. Gomez further added his diagnosis that Mr. Carter's appreciation of the criminality of his conduct was substantially impaired (§921.141(g)):

> I think his thinking was substantially impaired. We know that in highly charged situations neurologically he acts really impulsively. Personality wise he's impulsive, very rageful. Then you add these other substances, his cognitive abilities were substantially impaired.

(Hr'g Vol. I 140). Indeed, after acknowledging that statutory mitigators are important (Hr'g Vol. II 249), counsel stated that Dr. Gomez's testimony "makes a pretty good argument for two statutory mitigators." (Hr'g Vol. II 274). Further, testimony similar to Dr. Gomez's would have provided the foundation to disprove the critical statutory aggravator of CCP.

Moreover, the circuit court's error in finding that counsel was not deficient is exposed in [its] language in the Order Denying Defendant's Motion for Postconviction Relief:

> Even if counsel was deficient, Defendant would not have received a lesser sentence. See Belmontes, 130 S. Ct. at 386; Bradley, 33 So. 3d at 680-81. The trial court found three aggravating factors in this case, including that the murder was committed in a cold, calculated, and premeditated manner, one of the weightiest aggravators. Bradley, 33 So. 3d at 680-81. Thus, even if counsel had formally presented statutory mitigation through experts at the penalty phase of Spencer hearing, in light of the *entire body of aggravation* . . . there is no reasonable probability that the outcome would have been different . . . .

(emphasis added) (Order 38-39 (citing Wong v. Belmontes, 558 U.S. 15, 26-27 (2009); Bradley v. State, 33 So. 3d 664, 680-81 (Fla. 2010))). The court's language merely illustrates why counsel was deficient (and indeed, how counsel's deficient performance prejudiced Mr. Carter—see infra page 15). Facing the "entire body of aggravation" that the State intended to present, counsel chose not to present statutory mitigation, chose not to *disprove* "one of the weightiest aggravators," and chose to present non-statutory mitigation that gave Mr. Carter no reasonable likelihood of receiving a life sentence.

3. Counsel Was Deficient in Failing to Link the Traumatic Events of Mr. Carter's Upbringing to the Facts and Circumstances of the Crime

At penalty phase, counsel presented evidence of Mr. Carter's positive attributes. (Order 31-33). The jury learned how Mr. Carter rose above hardship, completed a successful stint in the military, worked hard, and then inexplicably killed his ex-girlfriend, along with her new boyfriend and daughter. Id. However, counsel did not provide a link or tool of understanding for the jury to learn *how* or *why* a seemingly nice man would kill three innocent people.

Counsel presented evidence of Mr. Carter's terrible upbringing through the testimony of four of Mr. Carter's siblings (Order 31-32). However, without providing a mental health expert to *link* his terrible upbringing and childhood to the crimes, counsel essentially presented this testimony in an attempt to make the jury

"feel bad" for Mr. Carter—a person who admitted to killing three people, and whom they just convicted of first-degree murder.

Counsel was deficient for failing to present a mental health expert to inform the jury that not only did Mr. Carter have a childhood filled with horrors that he was lucky to survive, but he committed his crimes as a result of that childhood, which caused him to suffer from an extreme mental or emotional disturbance at the time of the crime, and that because of his childhood, he was not able to conform his conduct to the requirements of the law at the time the crime was committed. (See supra Part I.A.1).

Counsel should have presented an expert's testimony about risk and protective factors: (a) to support two heavily weighted, statutory mitigating factors; (b) to disprove one statutory aggravating factor; and (3) to provide a link and scientific explanation between Mr. Carter's childhood and the facts of the crime. Counsel's failure to consider a mental health expert to testify about Mr. Carter's risk and protective factors was outside the bounds of reasonable, constitutionally sufficient capital representation.

B. PREJUDICE

Counsel's deficient performance in failing to present an expert to testify about risk and protective factors prejudiced Mr. Carter. Because of this failure, the evidentiary picture at penalty phase was significantly altered so that absent

counsel's errors, the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. Sochor v. State, 883 So. 2d 766, 771 (Fla. 2004) (citing Strickland, 466 U.S. at 687).

This Court has previously explained how penalty phase prejudice is evaluated under the Strickland standard:

> In assessing prejudice, we reweigh the evidence in aggravation against the totality of the mental health mitigation presented during the postconviction evidentiary hearing to determine if our confidence in the outcome of the penalty phase trial is undermined. . . . .

Hurst v. State, 18 So. 3d 975, 1013 (Fla. 2009) (quoting Hannon v. State, 941 So. 2d 1109, 1134 (Fla. 2006)). In order for the Court to properly evaluate prejudice in Mr. Carter's case, the first section of Mr. Carter's prejudice argument is a summary of Dr. Gomez's testimony at the evidentiary hearing. This testimony illustrates how a mental health expert could have strengthened Mr. Carter's penalty phase mitigation and changed his sentence from death to a life sentence.

1. Summary of Dr. Gomez's Findings Regarding Mr. Carter's Neurological Health and the Effects of Risk and Protective Factors on Mr. Carter's Life.

At the evidentiary hearing, Dr. Francisco Gomez, an expert in forensic psychology and forensic neuropsychology, gave a summary of his diagnosis of Mr. Carter. Dr. Gomez evaluated Mr. Carter through three primary methods: (1) acquiring third-party information; (2) a clinical and psychodiagnostic interview to discover any outward symptoms; and (3) a number of common evaluative

psychological tests.[8] (Hr'g Vol. I 96-108). Through these evaluations, Dr. Gomez found that Mr. Carter was emotionally immature, had hyperactive traits, and exhibited poor insight into his behavior. Id. at 109-11.

Dr. Gomez spoke of his involvement in a federally funded program to identify the effect of risk and protective factors on "problem behaviors." (Hr'g Vol. I 112-19). Those problem behaviors are violence, criminality, drug use, involvement with gangs, and impulsive behaviors. Id. at 112. The Department of Justice initiated the program to research how much traumatic events, society, environment, and poverty affects the likelihood of a person getting into trouble. Id. The results of these studies led to "individual risk factors." Id. at 111-113. Individual risk factors are broken down into five areas: (1) individual risk factors; (2) family risk factors; (3) school risk factors; (4) peer risk factors; and (5) community risk factors. Id. at 113.

Some risk factors are substantially more impactful than others, and the essential questions become, "what are the things that put you at risk, and what are the things that protect you from getting in trouble?" Id. at 114. This question led to the development of a "risk and protective model." Id. Though the study of risk and

[8] These tests include an I.Q. test; a reading and writing achievement test to determine if someone has a learning disability; a sensory field test; a grooved pegboard test to determine motor strength; a complex figure drawing test; a verbal fluency test; a Ruff Figural Fluency test; a Delis-Kaplan Trail Making test; the California Verbal Learning test; the Wisconsin card sort test; the MCMI-III; and the MCMI-2 test. Hr'g Vol. I 96-108.

protective factors is evolving to this day, Dr. Gomez stated that the first report detailing this study was done in 1993. Id. at 115. In their simplest form, risk and protective factors mean that the more risk factors you have, the more likely you are to get in trouble; if you have more protective factors, then you are less likely to get in trouble—no matter how many problems you have. Id. Dr. Gomez evaluated Mr. Carter's individual risk and protective factors, and the following is a summary of Dr. Gomez's findings—findings that a mental health expert could have testified about at Mr. Carter's penalty phase or Spencer hearing.

Dr. Gomez found that Mr. Carter had neurological impairment in problem solving. Id. at 20. When Mr. Carter is confronted with emotionally charged situations or is under stress, he acts impulsively. Id. Mr. Carter has a hyperactive disposition, which is a risk factor that has great impact. Id. People with hyperactivity have a three times higher rate of being involved in problem behaviors, such as violence and alcohol. Id. at 121. Mr. Carter had mild behavioral problems when he was younger, mostly due to a lack of supervision. Id. Dr. Gomez further stated that Mr. Carter had complex emotional trauma in his childhood because of the abandonment of his father, domestic violence, witnessing violence, and witnessing his stepfather abuse alcohol. Id. at 123. Complex trauma has a big impact on brain development and exacerbates risk factors. Id. at 122-23.

Generally, a clinician assesses for malingering[9] when an individual may have both a conscious and goal-directed reason for appearing psychologically impaired or minimizing psychological impairment. See Philips v. State, 984 So. 2d 503 (Fla. 2008) (finding that defense experts did not perform a complete evaluation of the defendant who was claiming mental retardation because the experts did not test for malingering). Dr. Gomez found nothing to indicate that Mr. Carter was malingering. Id. at 108. In fact, Mr. Carter was defensive, and "unwilling to endorse a lot of symptoms." Id. at 109.

Dr. Gomez then testified about Mr. Carter's family risk factors. Mr. Carter had the family risk factors of child maltreatment, poor family management, low levels of parental involvement, family conflict, and residential mobility. (Hr'g Vol. I 123-27). Mr. Carter also had two of the heavier-weighted family risk factors: (1) parental attitudes favorable to substance abuse or violence; and (2) parental child separation (his father left when he was very young). Id. at 126-27. Mr. Carter's school risk factors were academic failure and frequent school transitions. Id. at 127-28. Dr. Gomez did not find any peer-related risk factors, noting that Mr. Carter was not involved in gangs or violence, and never had difficulty making friends. Id. at 128. Lastly, Dr. Gomez found that Mr. Carter had the heavily-weighted

[9] "*Malingering* is the purposeful production of falsely or grossly exaggerated complaints with the goal of receiving a reward." PSYCHOLOGY TODAY, http://www.psychologytoday.com/conditions/malingering (last visited July 24, 2013) (emphasis added).

community risk factor of poverty. Id. Dr. Gomez then measured Mr. Carter's risk factors against his protective factors, and detailed those findings in his report. (See attached Report).

After explaining individual risk factors, Dr. Gomez expounded on "comorbid risk factors." "[They] are things that happen co-occurring. The 'co' means happening together, so what's comorbid would be someone who's got depression, and then the comorbid disorder is drug abuse." Id. at 133. Dr. Gomez then illustrated how comorbid risk factors applied to Mr. Carter:

> Well, first he had an underlying disability with his neurological impairments and then his personality disorder he had that made him very impulsive. He didn't think things out ahead of time . . . he had those problems. He had a lot of rage from his abandonment from the father, and so any time he was going to be abandoned he became very rageful and very out of control. As long as he left them it was fine and he was in control, but when they left him and he wasn't in control of it that's when he became . . . jealous or controlling, so he had the underlying disability. And then when you put that along with his suffering from depression, he had periods where his depression would increase, alcohol abuse, lack of sleeping and then what we call an emotionally charged situation then his risk factors, his risk for acting aberrantly go way up at that moment.

Id. at 133-34. Dr. Gomez found that Mr. Carter's criminal conduct was related to the combination of his risk and protective factors. Id. at 130. Indeed, Dr. Gomez believes that the life of an individual is shaped by a combination of his or her risk and protective factors. Id. at 116. Mr. Carter had a significant number of risk factors for violence, and if the right amount of situational factors were in play, he

could act aggressively. By putting Mr. Carter's experiences into a "risk and protective model," a mental health expert like Dr. Gomez could have compiled all his findings, and explained them to a jury or to the court.

2. A Mental Health Expert's Testimony About Risk and Protective Factors Would Have Established Two Statutory Mitigating Factors and Disproved One Statutory Aggravating Factor

If a mental health expert testified during Mr. Carter's penalty phase about the effect of risk and protective factors on Mr. Carter's life, the defense would have established the statutory mitigator of extreme mental or emotional disturbance. § 921.141(6)(b). Indeed this Court has underlined the importance of this statutory mitigator, and how failure to present this mitigation can "constitute prejudicial ineffectiveness." Hurst v. State, 18 So. 3d 975, 1014 (Fla. 2009) (quoting Rose v. State, 675 So. 2d 567, 573 (Fla. 1996)).

A mental health expert who has knowledge of risk and protective factors could have testified to how the combination of Mr. Carter's neurological impairment, his personality disorder making him very impulsive, his rage from being abandoned by his father, his depression, abuse of alcohol and prescription medicine, and his lack of sleep for thirty-six hours constituted a "toxic situation." (Hr'g Vol. I 133-35). Dr. Gomez went on to describe further:

> [Mr. Carter] has the underlying neurological problem in the personality style and those things that he did what they do is they decrease his protective factors. When you inhibit alcohol, when you're sleep deprived it inhibits your brain processing. You don't

> think as well when you've been up 36 hours as you do when you've been up 10 hours, okay? You get a deterioration. You add alcohol on top of that plus depression plus he's enraged because of a situation that ignites something in him then you have what we call a toxic situation. It's toxic because all these things come together.

Id. at 134-35. Dr. Gomez added his firm belief that Mr. Carter was under the influence of an extreme mental or emotional disturbance at the time of the murders. Id. at 139-140. This testimony would have established the statutory mitigating factor of extreme emotional or mental disturbance.

Additionally, a mental health expert's testimony about Mr. Carter's risk and protective factors could have shown that Mr. Carter's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. § 921.141(6)(f). Dr. Gomez, responding to the State's assertion that Mr. Carter brought a gun to a home he knew to contain his girlfriend and another man, explained that "[Mr. Carter] places himself in high-risk situations. His thinking and him becoming disinhibited, the alcohol, his neurological impairments, all those things, that's . . . the kind of thinking he has when he's in that state." (Hr'g Vol. I 136). Dr. Gomez further concluded that Mr. Carter's appreciation of his criminal conduct was substantially impaired. Id. at 140. Given these findings, the testimony of a mental health expert regarding risk and protective factors would have established the statutory mitigating factor of

substantially impaired ability to appreciate criminal conduct or conform to the requirements of law.

Further, a mental health expert's testimony about the effect of risk and protective factors on Mr. Carter would have disproved the statutory aggravating factor of CCP with respect to Glen Pafford and Elizabeth Reed. In order to establish CCP, the State must prove that the following four factors existed: (1) the killing was the product of cool and calm reflection rather than an act prompted by emotional frenzy, panic, or a fit of rage (cold); (2) the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated); (3) the defendant exhibited heightened premeditation (premeditated); and (4) the defendant had no pretense of moral or legal justification. Franklin v. State, 965 So. 2d 79, 98 (Fla. 2007) (citing Jackson v. State, 648 So. 2d 85, 89 (Fla. 1994)).

From Dr. Gomez's findings, it is clear that counsel could have presented expert testimony at penalty phase to show that Mr. Carter's crime did not meet the requirements of CCP. Rather, a mental health expert like Dr. Gomez would have shown that Mr. Carter's actions were committed in an impulsive fit of frenzy, panic, and rage, and were so spontaneous that Mr. Carter could not have had the requisite level of premeditation or prearranged design. Given Dr. Gomez's diagnosis, and his testimony buttressing his belief that Mr. Carter was under an extreme emotional disturbance when he committed the crimes,[10] a mental health

expert's testimony on risk and protective factors could have disproved the statutory mitigating factor of CCP.

3. Even if the Negative Evidence of Mr. Carter's Past Crimes Came Out in Front of the Jury, Mr. Carter Would Have Received a Life Sentence.

The circuit court emphasized that if a mental health expert testified on Mr. Carter's behalf, the "worst kind of bad evidence would have come in with the good." Therefore (according to the court), Mr. Carter was not prejudiced by counsel's deficiency because there is no reasonable probability that the outcome would have been different. (Order 38-39 (citing Bradley, 33 So. 3d at 680-81; Wong v. Belmontes, 558 U.S. 15, 26-27 (2009))). However, the court erred in making this determination.

Presenting an expert to testify about the effect of risk and protective factors on Mr. Carter's life would have revealed Mr. Carter's two prior crimes to a judge and jury, but any possible negative effect of these revelations would have been minimized because a neuropsychologist would have explained these prior crimes as part of a pattern of conduct linked to neurological impairment and risk and protective factors.[11]

---

[10] *See supra*, Part I.A.

[11] Dr. Gomez testified that Mr. Carter's actions in his two past crimes were consistent with the neurological and psychological impairments that Dr. Gomez found. Hr'g Vol. I 158.

Further, in Sears v. Upton, 130 S. Ct. 3259 (2010), the Supreme Court stated that even though postconviction mitigation may reveal adverse information, this does not mean that the defendant was not prejudiced by a counsel's failure to find and present this mitigation at trial:

> The fact that along with this new mitigation evidence there was also some adverse evidence is unsurprising . . . Competent counsel should have been able to turn some of the adverse evidence into a positive—perhaps in support of a cognitive deficiency mitigation theory . . . This evidence may not have made Sears any more likeable to the jury, but it might well have helped the jury understand Sears, and his horrendous acts . . . .

Id. at 3263-64. The Court's language applies to Mr. Carter's case. Had counsel presented this evidence within the framework of risk and protective factors, the jury at penalty phase would have understood *why* Mr. Carter committed the acts that he did. The jury was sympathetic to Mr. Carter despite the complete lack of statutory mitigation, and despite the mitigation theory that Mr. Carter was a "nice person"—an argument counsel made without a concrete, scientific, rationale for the crimes Mr. Carter committed.

Counsel could have presented all the same witnesses in favor of the mitigation theory that Mr. Carter was a good person, and counsel could have invoked the same sympathy from the jury that resulted in the close vote. However, counsel was ineffective because they stopped there. Though a mental health expert's testimony would have revealed Mr. Carter's past crimes, an expert would

have minimized the impact of their revelation by presenting them within the framework of risk and protective factors, and providing a scientific explanation for why the past crimes occurred.

4. If Counsel Presented a Mental Health Expert at Penalty Phase to Testify About Risk and Protective Factors, Mr. Carter Would Have Received a Life Sentence

When viewed in concert with the weak, non-statutory mitigation offered at Mr. Carter's penalty phase, had counsel presented an expert's testimony about Mr. Carter's neurological impairment and risk and protective factors, Mr. Carter would have received a life sentence.

"Penalty phase prejudice under the Strickland standard is measured by whether the error of trial counsel undermines this Court's confidence in the sentence of death when viewed in the context of the penalty phase evidence and the mitigators and aggravators found by the trial court." Hildwin v. State, 84 So. 3d 180, 187 (Fla. 2011) (citing Stewart v. State, 37 So. 3d 243, 253 (Fla. 2010)). In order to evaluate the prejudice inflicted upon a defendant because of counsel's failure to present mitigation, any additional mitigation presented during postconviction proceedings must be considered in concert with the mitigation presented and proven at the penalty phase to determine whether the Court's confidence in the outcome is undermined. Porter v. McCollum, 130 S. Ct. 447, 453-54 (2009). This Court follows the same approach. See supra Hurst, Part I.B.II.

Further, "[m]ental mitigation that establishes statutory and non-statutory mitigation can be considered to be a weighty-mitigator, and failure to discover and present it, especially where the only other mitigation is insubstantial, can therefore be prejudicial." Hurst, 18 So. 3d at 1014. In Hurst, this Court reversed for a new penalty phase, finding that "testimony could have been presented to the jury to augment the 'negligible' and 'minimal' mitigation noted by this Court on direct appeal." Id.

Further, this Court has always emphasized that mental mitigation, if presented, can overturn a death sentence even in the face of statutory aggravation. See Green v. State, 975 So. 2d 1081, 1088-89 (Fla. 2008) (reversing death sentence despite aggravator of heinous, atrocious, and cruel); Carter v. State, 560 So. 2d 1166, 1168-69 (Fla. 1990) (vacating death sentence based on defendant's neurological impairment, increased impulsiveness, diminished ability to plan events, and one psychologist's testimony that the defendant "probably" was unable to appreciate the criminality of his conduct).

The jury was sympathetic to Mr. Carter, and its sentencing recommendation reflected its sympathies. The jury recommended a life sentence for Courtney Smith's death; the death sentence by only a 9-3 vote for Glen Pafford's death; and the death sentence by only an 8-4 vote for Elizabeth Reed's death. Carter, 980 So. 2d at 479. The close jury vote was accomplished despite the weak, non-statutory

mitigation offered in Mr. Carter's defense. Had counsel presented a mental health expert—along with the twenty-seven witnesses presented—counsel could have provided a scientific explanation for Mr. Carter's actions *in addition* to evidence supporting the theory that Mr. Carter was a good person who affected many people in a positive way. Like in Hurst, Mr. Carter's mitigation at penalty phase was "insubstantial," and counsel's failure to discover and present valuable mental mitigation in the form of expert testimony on risk and protective factors prejudiced Mr. Carter.

Because the State was seeking three statutory aggravators at penalty phase, Mr. Carter was prejudiced by his counsel's failure to seek even one statutory mitigator. This Court maintains that the death sentence is reserved "only for those cases where the most aggravating and least mitigating circumstances exist." Terry v. State, 668 So. 2d 954, 965 (Fla. 1996) (citing State v. Dixon, 283 So. 2d 1, 7 (Fla. 1973)).

Counsel could have presented powerful statutory mitigation. Dr. Gomez's testimony would have proven two statutory mitigating factors, including extreme mental or emotional disturbance, which this Court has "consistently recognized . . . is a mitigating factor of the most weighty order, and the failure to present it in the penalty phase may constitute prejudicial ineffectiveness." Rose, 675 So. 2d at 573.

In the State's closing argument in front of the jury at penalty phase, the prosecutor pointed out the vast difference in the statutory mitigation presented by the State, and the non-statutory mitigation presented by Mr. Carter's counsel. When asking the jury to recommend the death sentence for the death of Glenn Pafford, the prosecutor—after pointing out that the State had already proven two statutory aggravators—stated the following:

> [A]nd then number three is the crime for which the defendant is to be sentenced was committed in a cold and calculated and premeditated manner and without any pretense of moral or legal justification. So *one aggravator like this is enough in terms of this weight*, but what you have here in terms of just the murder of Glenn Pafford is you have actually on behalf of the State of Florida I will submit three separate aggravators. Look at just the first one. Doesn't that just *by itself* in terms of the murder of two other human beings that [the defendant] has been convicted of, *doesn't that aggravation outweigh any mitigation that you've heard for the last few days*?

(R Vol. XXIII 2834-35) (emphasis added). The prosecutor then exposed the weak mitigation that Mr. Carter's counsel presented at penalty phase:

> But that's what they want you to consider, that he had a terrible childhood. So that is mitigation to consider. There's no dispute that they've proven that. How much weight do you assign to that? And does that outweigh the aggravators in this case? Does it outweigh *just even one of the murders*? Does it outweigh the second? Does it outweigh the third? (R Vol. XXIII 2850) (emphasis added).

Using the standard in Hurst and Porter, the difference between Mr. Carter's mitigation presented at penalty phase and the mental mitigation available through a mental health expert is staggering. As in Porter, Mr. Carter was prejudiced by his

counsel's failure to uncover and present crucial mental mitigation. Here, where the jury's recommendation leaned only slightly in favor of death despite the complete absence of mental mitigation, any kind of expert testimony to present arguments in favor of statutory mitigation would have changed the outcome of Mr. Carter's penalty phase. A mental health expert's testimony about the effect of risk and protective factors on Mr. Carter's life, when viewed in concert with the minimal mitigation offered at Mr. Carter's penalty phase, must undermine this Court's confidence in Mr. Carter's death sentence.

The circuit court found that Mr. Carter was not prejudiced by his counsel's failure to present a mental health expert. (Order 38-39). However, the court's reasoning for this decision illustrates the court's error. The court emphasized that there was a vast "body of aggravation" against Mr. Carter, but failed to address that counsel was ineffective for failing to present a mental health expert to disprove the statutory aggravator of CCP, an aggravator that the court itself—and this Court—stated is "one of the weightiest aggravators." (Order 38 (citing Bradley v. State, 33 So. 3d 664, 680-81 (Fla. 2010))). Had counsel presented this mental mitigation, counsel could have disproven the critical aggravator of CCP and taken a huge bite out of the "entire body of aggravation" that the court believed gave Mr. Carter no reasonable probability of a different sentence.

A penalty-phase presentation of two statutory mitigators and multiple non-statutory mitigators vs. two statutory aggravators[12] would have given Mr. Carter a different sentence, and saved his life. Mr. Carter's life is certainly not a game, but as in a game of soccer, when the score of statutory aggravation v. statutory mitigation stood at 3-0, everyone knew (including the court) what the result of Mr. Carter's penalty phase would be: Death. However, at 2-2, the result would have been unclear, and this Court's confidence in the outcome of Mr. Carter's penalty phase must surely be undermined.

The lower court placed great emphasis on the U.S. Supreme Court's ruling in Wong v. Belmontes, finding that Mr. Carter was not prejudiced by his counsel's failure to present a neuropsychologist because the jury could have made "logical connections" without an expert, and the testimony would have "opened the door for rebuttal evidence regarding negative events in [Mr. Carter's] past." (Order 31, 37 (citing Wong v. Belmontes, 558 U.S. 15, 24 (2009))). However, the relevant language in Belmontes demonstrates that Mr. Carter's case is distinguishable:

> [T]he body of mitigating evidence [the expert would have presented] was neither complex nor technical. It required only that the jury make logical connections of the kind a layperson is well equipped to make. The jury simply did not need expert testimony to understand the 'humanizing' evidence; it could use its own common sense or mercy.

---

[12] If Mr. Carter's trial counsel had disproved the statutory aggravator of CCP through the testimony of a mental health expert and argued for the other two statutory aggravators, the trial court would have found two statutory aggravators and two statutory mitigators.

Belmontes, 558 U.S. at 24.

Here, as Dr. Gomez's testimony illustrates, an expert's testimony about risk and protective factors in Mr. Carter's case would have been scientific and complex, and would have presented evidence of Mr. Carter's neurological impairment and studies demonstrating how risk and protective factors shape an individual's life and decisions. A layperson cannot make logical connections when he or she is unaware of the science used to make the connections. Further, the potential rebuttal evidence in Belmontes was damning evidence indicating the defendant (convicted of murder) committed a prior murder. Id. at 17-18. Here, though the incident with Mr. Carter's ex-wife was certainly serious, it was nowhere near as damaging.

The circuit court further stated that Mr. Carter's risk and protective factors were included in what defense counsel provided to the jury. (Order 37). Admittedly, the jury did hear about Mr. Carter's upbringing and experiences, and an expert like Dr. Gomez did not learn anything *new* about Mr. Carter. However, testimony about risk and protective factors was *not* provided to the jury, because *risk and protective factors were not mentioned*. Without any correlation between Mr. Carter's experiences and the crimes, without any framework to make sense of his experiences and neurological issues, the testimony about Mr. Carter's terrible upbringing was only presented for the jury to "feel bad" for a man already

convicted of murder for the deaths of three people. Expert testimony about risk and protective factors would have put Mr. Carter's traumatic experiences and neurological impairment into a proper framework, and provided a correlation between those experiences and his crimes—to provide an explanation for *why* Mr. Carter committed the crimes he did. (Hr'g Vol. I 130)**.** In essence, counsel threw the pieces of the psychological puzzle on the table without putting those pieces together to show the jury or court the full picture.

Further, Mr. Carter was prejudiced by defense counsel's failure to present a mental health expert's testimony at the Spencer hearing. After the State presented evidence to prove three statutory aggravators (and after the jury recommended death), there was no likelihood that a trial judge would consider Mr. Carter's non-statutory mitigation and give a life sentence because he or she "felt bad" or Mr. Carter.

Moreover, testimony about risk and protective factors could have presented another powerful argument in favor of a life sentence. The jury would have heard how Mr. Carter is a productive member of society when he is in "protective" environments with structure and rules.[13] (Hr'g Vol. I 142). This, along with Mr.

[13] Mr. Carter had a good military service record and was recommended for reenlistment before leaving the United States Air Force early to attend college. Order 32. Mr. Carter also stayed out of trouble, participated in many student organizations, and developed many positive relationships during his time at Oklahoma State University. Id.

Carter's clean disciplinary record since incarceration,[14] would have reinforced the argument for life in prison instead of death.

II. THE TRIAL COURT ERRED IN DENYING MR. CARTER'S CLAIM THAT TRIAL COUNSEL WAS DEFICIENT IN FAILING TO MOVE FOR A CHANGE OF VENUE, THEREBY PREJUDICING MR. CARTER BY PROHIBITING HIM FROM SELECTING AN IMPARTIAL JURY

Mr. Carter presented a claim that counsel was ineffective in failing to move for a change of venue within Claim Three of his 3.850/3.851 to the trial court. (Def.'s Mot. To Vacate J. and Sentence 19). The trial court denied the claim, finding Mr. Carter "did not provide evidence of extensive and/or inflammatory publicity to support his claim that counsel performed deficiently" by failing to file a motion for change of venue, and Mr. Carter "did not meet his burden under the second prong of Strickland to show that a motion for change of venue, if made, would have or should have been granted." (Order 12). The trial court erred in making this conclusion; Mr. Carter was denied his right to an impartial jury under the Florida Constitution. Art. I, §16, Fla. Const.

[14] Mr. Carter has not had a discipline problem in prison in the last ten years. Hr'g Vol. I 142.

A. MR. CARTER'S CRIMES WERE HEAVILY PUBLICIZED BOTH LOCALLY AND NATIONALLY, AND SEVEN JURORS IN MR. CARTER'S CASE HAD KNOWLEDGE OF MR. CARTER'S CASE BEFORE TRIAL

Here, Mr. Carter was prejudiced by his counsel's failure to move for a change of venue because Mr. Carter's crimes were heavily publicized both in the immediate and national communities, the victims were beloved members of their communities, and their deaths resulted in public outcries and protest. Local news sources ran forty-two separate articles and features from July 24, 2002 to the completion of sentencing on December 22, 2005.[15] Mr. Carter's case received

[15] The following media release narrative is a summary of the information contained in local and national media sources sorted chronologically by date, all of which were released locally prior to trial: Two adults were killed, and a child wounded (7/24/02, 8:18 am FTU/jacksonville.com); a 14 year old boy called police and that 3 other children were in the house at the time (7/24/02 8:18 am newsforjax.com); the police had a suspect in the shootings (7/24/02 12:28 pm newsforjax.com); Pinkney "Chip" Carter was the suspect and that he was driving a 1999 red dodge truck with license plate tag number KIKMHI (7/24/02 1:38 pm newsforjax.com); the 16 year old victim died 3 days after the shooting (7/29/02 5:42 pm newsforjax.com); Carter was detained in Mexico by army officials and crossed the Rio Grande (8/8/02 12:34 pm newsforjax.com); Carter "fled" from officials in Texas after they requested to search his truck and subsequently declined to speak with Jacksonville homicide detectives who travelled to Mexico (8/8/02 12:11 am FTU/Jacksonville.com); Carter replaced his Florida vehicle tag with a stolen Georgia tag, no blood was found in the vehicle, he was arrested in Ciudad Miguel Aleman, and was carrying a handgun and $5,000 in cash at the time (8/9/02 FTU/Jacksonville.com and 8/9/02 9:54 am newsforjax.com); Carter was released from Mexican custody on November 27, 2002 after paying $1,000, Mexico did not inform JSO that he was released until December 24, 2002, he was formally charged with three murders by the State Attorney's Office on December 26, 2002, that JSO spokesman Frank Mackesy found his release to be "…one of the most frustrating things I have ever encountered;" "no further information would be publically released by JSO" until it exhausted efforts to get him back from Mexico;

national media attention at least twice. Throughout the manhunt for Mr. Carter, he no extradition treaty exists between the US and Mexico, and that the FBI was involved in the search for Carter (2/23/03 7:41 am newsforjax.com and 2/21/03 FTU/Jacksonville.com); that the JSO was frustrated by Mexico's release of Carter since "we've done a lot for Mexico so you would think they in turn would be more just in dealing with the United States" and that a $5,000 reward was being offered for information (2/23/03 5:14 pm newsforjax.com); Mr. Carter was soon to be featured on America's Most Wanted, that JSO's lead detective planned to "walk the TV crew through the house, explaining what happened," that gunfire killed the victims, that Carter "fled shortly after the shooting deaths," and that the victim's father stated that Carter "stalked and terrorized [Reed]," (4/12/03 12:46 am newsforjax.com and 4/13/03 FTU/Jacksonville.com); that "one year after the killings, Carter remains unfound", that the police believe Carter to be the murderer, that Carter was "upset because [Reed] had broken off their relationship", that Carter "snuck in her back yard through a screen door and shot them," that the victim's family said that, "They will find him…it may take a while…and the State of Florida will make sure [he] burns in hell just as soon as possible," and that the FDLE reward was upped to $13,000 for information on Carter with Publix and Crime Stoppers contributing another $8,000 (7/24/03 6:24 pm First Coast News, 7/24/03 5:28 newsforjax.com); that Carter was featured in People Magazine, and that the US State department was discussing the case with Mexico's deputy secretary for foreign affairs (12/4/03 5:51 newsforjax.com); People magazine portrayed Carter as "dodging justice by hiding in Mexico," that he was "a punk", that he "slashed [Reed's] tires in 2002", that it was a strategic decision by the State Attorney's office not to get an arrest warrant as Mexico "had their man on ice," and that Florida prosecutors agreed to drop the death penalty (November 10, 2003 People Magazine); that Florida prosecutors asked Mexico for help in catching Carter and agreed not to seek the death penalty in exchange for aid, that the victim's family "don't want [Carter] put to death…we want him to have a really long life because we want him to remember every day what he's done, just as we remember every day what he's done (12/9/03 1:31 am newsforjax.com and 2:33 am FTU/Jacksonville.com); that Carter was apprehended in Mayfield Kentucky on January 1, 2004 (1/6/04 12:26 pm newsforjax.com, First Coast News 12:54 pm, FTU/Jacksonville.com); Carter assumed the name Rodney J. Vontun while living in Kentucky, that Carter was being extradited to Florida within days (1/7/04 9:55 am newsforjax.com); the gun Carter used to kill three people was found in the Rio Grande River (1/10/04 FTU article); Carter was indicted for the three murders and that the State Attorney was now seeking the Death Penalty (1/16/04 FTU article), the state was using letters written by Carter to his mother and brother against him in trial and that Carter owned "several" guns (2/9/04 7:04 pm newsforjax.com).

remained on the FBI's Most Wanted list. On January 17, 2004, *America's Most Wanted*[16] ran a profile on Mr. Carter shortly after authorities captured him. Further, *People Magazine* published a story on Mr. Carter on November 10, 2003 while he was still at large that presented Mr. Carter's guilt as a foregone conclusion.[17] Various local news agencies in the Jacksonville area relentlessly followed his case up until sentencing.[18] To this day, Mr. Carter's case continues to attract national attention—the FBI was interviewed in January of this year for a "TV special" (set to air within a year) about Mr. Carter's case.[19]

In the initial voir dire questioning, thirty-five of the seventy member jury panel stated that they previously learned about the case from the extensive local coverage. Of these thirty-five members who admitted having prior knowledge, four were excused for cause for admitting that they could not make an unbiased

---

[16] *Season 17, Episode 15*, AMERICA'S MOST WANTED (Jan. 17, 2004), http://www.tvmuse.eu/tv-shows/America-s-Most-Wanted_12211/season_17/episode_15/**.** Citation moved to footnote to avoid formatting problems.

[17] Bill Hewitt, *Beyond the Law: The Prime Suspect in a Triple Homicide, Chip Carter Dodges Justice by Hiding in Mexico*, PEOPLE MAGAZINE, Nov. 10, 2003, *available at* http://www.people.com/people/archive/article/0,,20148580,00.html.

[18] See e.g., *Suspect in triple slaying captured*, THE SARASOTA HAROLD TRIBUNE via THE ASSOCIATED PRESS, Jan. 7, 2004, http://news.google.com/newspapers?nid=1755&dat=20040107&id=kvQeAAAAIBAJ&sjid=9IQEAAAAIBAJ&pg=5265,1581543.

[19] *Jacksonville Fugitive Case to be Revisited in Television Special: The Search for Pinkney Carter*, FEDERAL BUREAU OF INVESTIGATION, Jan. 22, 2013, http://www.fbi.gov/jacksonville/news-and-outreach/stories/jacksonville-fugitive-case-to-be-revisited-in-television-special.

decision as a juror because of prior knowledge of the case. (R Vol. X 201-348). Of the thirty-one remaining persons who admitted prior knowledge of the case, *seven* were chosen as jurors for Mr. Carter's trial.[20]

Juror Cammon remembered reading in the newspaper "about the killing that took place." (R Vol. IX 138). During the court's attempt to rehabilitate him, Juror Cammon stated that he felt his prior knowledge would not interfere with his ability to weigh the evidence at trial. (R Vol. IX 141). Cammon was not challenged for cause by trial counsel, nor was he struck via a peremptory challenge.

Juror Miller stated the following when asked by the court about her prior knowledge of the case:

> I briefly heard it on the news this morning and I also recall some bits and pieces from several years ago. I think, when it first happened, just scattered bits of information about the man going into the house and killing three people, that it was a relationship gone bad. He had come back out of anger for the relationship ending and killing those people . . . . That and just conversation – yes, and conversation recently just as it surfaced.

R Vol. IX 150.

As with Juror Cammon, the court felt that Juror Miller was "rehabilitated" despite the extensive knowledge that she was able to give upon questioning. Trial counsel neither challenged Juror Miller for cause, nor struck her via a peremptory

[20] Specifically, jurors George Cammon, Teresa Elmore, Margaret Rusnak, Dixie Borthwick, Julie Smith, and Robert O'Neil admitted that they had prior knowledge of the case through various media sources prior to trial. R. Vol. IX 138-278.

challenge. R Vol. IX 153.

Juror Elmore stated upon questioning that, "I think I heard something probably within the last year and then frankly, this morning." Ms. Elmore indicated that her information was gained through television news reports. R Vol. IX 189. Ms. Elmore met the court's definition of rehabilitation upon further questioning. R Vol. IX 190. However counsel neither challenged her for cause nor exercised a peremptory strike. R Vol. IX 194.

Juror Rusnak stated that, "this morning early when I was getting ready to come down for work I heard that there was going to be a trial down here today of a crime that had taken place a couple of years ago." R Vol. X 209. Ms. Rusnak stated that she had no prior knowledge of the case other than what she heard on television that morning, and was deemed rehabilitated as a potential juror. Ms. Rusnak was not questioned by defense counsel, nor was she challenged for cause or peremptorily struck. R Vol. X 212.

Juror Borthwick admitted that she heard about the case through both her mother in law—an employee of the Publix where Mr. Carter was employed—and First Coast News. R Vol. X 245. Ms. Borthwick stated that she knew more about that case than the court stipulated to prior to her individual questioning, specifically:

> He had changed his – his identity with this girlfriend, fiancé, different name . . . he had tried to assume a different identity so that

> no one would know who he was, and his fiancé or the girlfriend that he was with at that particular time had no idea of who he was at that time, that she assumed that he was another person.

R Vol. X 246. Juror Borthwick's testimony illustrates that local media sources contained more information than what was given to the jurors in voir dire, and also demonstrates the extent of the media coverage. Juror Borthwick was not challenged for cause, nor did defense counsel exercise a peremptory challenge against her. R Vol. X 254.

Juror Smith admitted to seeing reports on the "Channel 12" news on the morning of jury selection (R Vol. X 254), but didn't provide any details to the court when questioned. Ms. Smith was not challenged for cause or excuses via peremptory strike. R Vol. X 257.

Juror O'Neil admitted that he had a number of interactions with Mr. Pafford prior to his death (R Vol. X 278) at the Publix where Pafford was employed, and that he had followed the case in the media, stating that he was aware of the flight to Mexico and the subsequent arrest in Kentucky. R Vol. X 277-78. Like the previous jurors, trial counsel did not challenge Mr. O'Neil for cause, nor was a peremptory strike used to eliminate the potential bias.

However, Mr. Carter exhausted all peremptory challenges due to the partial nature of the potential jurors, and was forced to accept a jury with over twenty potential jurors remaining. R. Vol. XII 797-98. Though Mr. Carter approved of the

final jury panel chosen, he was acting under the advisement of his deficient attorneys, who should have moved for a change of venue. R. Vol. XII 773, 797-98.

B. MR. CARTER WAS PREJUDICED BY COUNSEL'S FAILURE TO MOVE FOR A CHANGE OF VENUE BECAUSE THE PRE-TRIAL PUBLICITY WAS EXTENSIVE AND INFLAMMATORY AND THERE WAS GREAT DIFFICULTY IN SELECTING AN IMPARTIAL JURY

When evaluating a claim that counsel was ineffective for failing to move for a change of venue, "[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 v. State, 497 So. 2d 1177, 1182 (Fla. 1986). When a motion for a change of venue is filed, this Court has declared that a trial court should evaluate "(1) the extent and nature of any pretrial publicity; and (2) the difficulty encountered in actually selecting a jury." Griffin v. State, 866 So. 2d 1, 12 (Fla. 2003) (quoting Rolling v. State, 695 So. 2d 278, 285 (Fla. 1997)).

This Court examines pretrial publicity with attention to a number of circumstances, including: (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 prosecution's 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. Foster v. State, 778 So. 2d 906, 913 (Fla. 2001). Granting a change in venue in a

questionable case is certain to eliminate a possible error and to eliminate a costly retrial if it is determined that the venue should have been changed. See Manning v. State, 378 So. 2d 274 (Fla. 1979).

Further, a defendant must produce evidence to support his claim that pretrial publicity was extensive and/or inflammatory. Dillbeck v. State, 964 So. 2d 95, 104 (Fla. 2007) (finding that counsel was not ineffective for failing to move for a change of venue because the defendant did not demonstrate any legal basis for filing a motion for change of venue, and the defendant produced absolutely no evidence of extensive pretrial publicity in support of the claim). Further, when applying the prejudice prong to a claim that defense counsel was ineffective for failing to move for a change of venue, the defendant must, at a minimum, "bring forth evidence demonstrating that the trial court would have, *or at least should have*, granted a motion for change of venue if [defense] counsel had presented such a motion to the court." Id. at 103 (quoting Wike v. State, 813 So. 2d 12, 18 (Fla. 2002)) (emphasis added). In Griffin, this Court found that there was no reasonable probability that a motion for change of venue would have been granted because the *record demonstrated it had not been difficult selecting an impartial jury*. 866 So. 2d at 12-13.

Here, the jurors' statements and the media coverage illustrate that Mr. Carter was prejudiced by counsel's failure to move for a change of venue. Mr. Carter's

case meets the factors outlined in Foster: (1) the scrutiny of the case spanned over three years, including the entirety of the investigation and manhunt prior to trial, the week of trial, and the subsequent sentencing; (2) the publicity and coverage included biased and inflammatory statements made by news reporters, family members of the victim, and JSO officers that were misleading and based on minimal evidence; (3) the publicity and coverage was biased towards the prosecution; (4) the local sources that covered the story reached thousands of people in Northeast Florida; and (5) the ten peremptory challenges were used by trial counsel, and trial counsel petitioned the court for an additional strike using eleven peremptory challenges in total. Despite the extremely high level of publicity, Mr. Carter's trial counsel did not argue for a change of venue at any point in the proceedings. After Mr. Carter's conviction, the jury recommended the death penalty. Carter, 980 So. 2d at 479 (Fla. 2008).

Under the prongs of Strickland, trial counsel was deficient for failing to move for a change of venue given the massive amount of national and local media coverage. The publicity was extensive, inflammatory, and planted a seed of Mr. Carter's presumed guilt into the minds of any individual who read or observed media coverage of the case. Though 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.

Further, under Dillbeck, Wike, and Griffin, Mr. Carter was prejudiced because a change of venue *should have* been granted had trial counsel presented such a motion. Mr. Carter's case is distinguishable from Griffin because the record reflects that his trial counsel had great difficulty in selecting an impartial jury. The jury selection was a long, arduous process wherein half of the venire panel admitted knowledge of the case. Additionally, the coverage of Mr. Carter's case was extensive and contained nearly all the details eventually presented by the State at trial. Despite full knowledge of the difficult in securing a fair trial for Mr. Carter, counsel did not move for a change of venue. Counsel was deficient in failing to move for a change of venue, and that failure prejudiced Mr. Carter.

For the reasons stated, Mr. Carter's counsel provided ineffective assistance under the United States and Florida Constitutions, and that ineffective assistance denied Mr. Carter the fair trial he is guaranteed under the United States and Florida Constitutions. The circuit court erred in denying Mr. Carter's claim that his counsel was ineffective for failing to move for a change of venue.

CONCLUSION

Wherefore, Pinkney Carter respectfully requests this Honorable Court to reverse and remand the trial court's denial of his Motion for Postconviction Relief and grant him a new trial, or a new penalty phase.

CERTIFICATE OF SERVICE

The undersigned counsel hereby CERTIFIES that a true and correct copy of the foregoing has been furnished via email to Assistant State Attorney, Bernie de la

Rionda, at brionda@coj.net, and Assistant Attorney General, Steve White, at steve.white@myfloridalegal.com, on this 12th day of November, 2013.

/s/
FRANK J. TASSONE
Fla. Bar No. 165611
TASSONE & DREICER, LLC.
1833 Atlantic Blvd.
Jacksonville, FL 32207
(904) 396-3344
Fax (904) 396-3349

CERTIFICATE OF COMPLIANCE WITH FLA. R. APP. P. 9.210

The undersigned counsel hereby CERTIFIES that his brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2) and was typed in Times New Roman 14-point font.

/s/
FRANK J. TASSONE
Fla. Bar No. 165611
TASSONE & DREICER, LLC.
1833 Atlantic Blvd.
Jacksonville, FL 32207
(904) 396-3344
Fax (904) 396-3349