IN THE SUPREME COURT OF FLORIDA

CASE NO. SC14-1967

LANCELOT URILEY ARMSTRONG,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This capital case involves the appeal of the circuit court's denial of Lancelot Uriley Armstrong's motion for postconviction relief filed pursuant to Florida Rule of Criminal Procedure 3.851. The following abbreviations will be utilized to cite to the record in this matter, with appropriate page number(s) following the abbreviation:

"R." - Record on direct appeal to this Court from the 2009 resentencing;

"PCR-1." - Record on appeal following the 2001 postconviction denial;

"PCR-2." - Record on appeal following the 2014 evidentiary hearing;

"DE or SE" - Exhibits entered into evidence at the 2014 evidentiary hearing.

REQUEST FOR ORAL ARGUMENT

Armstrong has been sentenced to death. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument is appropriate in this case, given the seriousness of the claims involved. Armstrong, through counsel, urges this Court to permit oral argument.

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STATEMENT OF THE CASE

Lancelot Uriley Armstrong was indicted on March 7, 1990 for first degree murder, attempted murder of a law enforcement officer, and armed robbery. Armstrong pled not guilty, was tried before a jury, and convicted on all counts on April 17, 1991. After a penalty phase proceeding and *Spencer* hearing,[1] the jury recommended death by a vote of nine to three. The circuit court sentenced Armstrong to death on June 20, 1991. His convictions and sentences were affirmed by this Court on direct appeal. *Armstrong v. State*, 642 So. 2d 730 (Fla. 1994) ("*Armstrong I*").

The Office of the Capital Collateral Regional Counsel-South (CCRC-South) was appointed to represent Armstrong in postconviction proceedings upon the issuance of the mandate on October 31, 1994. On April 20, 2000, Armstrong filed a motion to vacate pursuant to Florida Rule of Criminal Procedure 3.850, raising thirty-four issues. The circuit court held evidentiary hearings March 21-23, 2001.

After the evidentiary hearing, the trial court denied relief on all claims. On appeal, this Court vacated the death sentence and remanded the case for resentencing before a new jury because the death sentence was predicated, in part, on a previous felony conviction which was vacated after the trial and direct appeal. *Armstrong v. State*, 862 So. 2d 705 (Fla. 2003) ("*Armstrong II*").

[1] *Spencer v. State*, 615 So. 2d 688, 690-91 (Fla. 1993).

Pursuant to this Court's mandate, attorney Hilliard Moldof was appointed to represent Armstrong at his resentencing. Subsequently, attorneys David Rowe and Donovan Parker were privately retained and filed a Notice of Appearance on May 22, 2006. They represented Armstrong throughout the resentencing. Moldof was dismissed from the case on May 19, 2006. Jury selection began on April 10, 2007 and on April 16, 2007, the jury was sworn and the evidentiary portion of the penalty phase began. On April 25, 2007, the jury again recommended a sentence of death by a vote of nine to three. The trial court held *Spencer* hearings on September 7, 2007, November 15, 2007, and November 30, 2007, and sentenced Armstrong to death on August 7, 2009.

This Court affirmed Armstrong's conviction and sentence on direct appeal. *Armstrong v. State*, 73 So. 3d 155 (Fla. 2011) ("*Armstrong III*"). Armstrong filed a petition for writ of certiorari in the United States Supreme Court, which was denied. *Armstrong v. Florida*, 132 S. Ct. 2741 (June 11, 2012).

CCRC-South was again appointed to represent Armstrong in his postconviction proceedings upon the issuance of the mandate on October 14, 2011. Armstrong timely filed his initial motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.851 on May 29, 2013. (PCR-2. 195-334.) On October 25, 2013, the circuit court held a case management conference, after which the court entered an order granting a limited evidentiary hearing on the following claims: part

of Claim IV alleging ineffective assistance of counsel for failing to further inquire of Juror Gail Bacchus what she meant by the statement that she could vote for the death penalty because "the defendant was in a situation;" part of Claim VII alleging ineffective assistance of counsel for failing to call witness Kengeral Allen who was at the crime scene and could have testified that Armstrong was a minor participant; and Claim VIII alleging ineffective assistance of counsel based on actual conflict of interest. (PCR-2. 730-31.)

The circuit court held evidentiary hearings on March 24 and 25, 2014. Undersigned counsel presented four witnesses; the State presented no witnesses. The parties were allowed to file written closing arguments following the hearing. Armstrong filed a post-hearing memorandum on June 9, 2014. (PCR-2. 1261-1344.)

On June 3, 2014, the circuit court issued an order denying relief. (PCR-2. 1345-1401.) Armstrong timely filed a Notice of Appeal on September 30, 2014. (PCR-2. 1402-03.) This appeal follows.

STATEMENT OF THE FACTS

The 2001 Evidentiary Hearing

Postconviction counsel presented six experts and seven lay witnesses at the 2001 evidentiary hearing. The State presented no witnesses. The lay witnesses gave the court a harrowing glimpse into Armstrong's childhood and early life, and the experts provided insight into the psychological and physiological effects of the childhood abuse and neglect he suffered.

After struggling to survive his first several months of life, young Armstrong grew up in the poverty-stricken settlement of Martha Brae with his large family, which included his mother, Dorret English, his aunt, Pamela Weir Mitchell, his grandmother, and four siblings. Life in Martha Brae was hard, and necessities were hard to come by. When they needed water, the children collected it from a standpipe in the street and stored it in oil drums. (PCR-1. 1327-28.) Food consisted of fruit from banana and breadfruit trees, and fish from the river behind the house, which was cooked on a rudimentary coal stove, or in old paint cans. (PCR-1. 1331-32, 1215.) Before Armstrong was five years old, he had already sustained multiple traumas and injuries, mostly to his brain.

When Armstrong was still a little boy, his mother met and married an abusive man, Neville Foster, who beat her and the children routinely and brutally. (PCR-1. 1307.) Foster was an alcoholic who would come home drunk, vomit, and pass out in

the mess. (PCR-1. 1361.) When Foster beat the children, he would use a special strap that he kept on his belt at all times. (PCR-1. 1309.) Even though physical punishment was commonplace in Jamaica, the brutality in Armstrong's childhood home was extreme. Armstrong was also "disciplined" by his mother, aunt and grandmother, who beat him with belts and sticks. (PCR-1. 1337-38.) Dorrett, wishing to make a better life for herself and her five children, left town to attend nursing school in Kingston, the capital of Jamaica, which is located on the other side of the island. (PCR-1. 1341-42.) She would be gone at least half the week, during which she left the children behind with her abusive husband and sister.

The neglect and abuse Armstrong experienced began to take its toll. When he was a small child, Armstrong developed pica, a disorder frequently seen in neglected or abused children. (PCR-1. 1267.) Pica is characterized by an appetite for non-nutritive substances such as clay, chalk, dirt, or sand. Armstrong began eating paint chips, dirt, and chicken feces in the yard. (PCR-1. 1311, 1215.) He also began to bang his head against the wall until it bled, especially after the frequent beatings. (PCR-1. 1310-11.) He experienced frequent headaches and nosebleeds but continued to hurt himself. (PCR-1. 1310-11.)

Armstrong found no escape or solace when he went to school. School was torture because of his severe learning disabilities and a very pronounced stammer. He suffered from frequent nosebleeds and mysterious "fits," where he would black

out and his head would roll back, and his body would shake uncontrollably, which further isolated him from other children. (PCR-1. 1334-35.) He suffered from vomiting, diarrhea, and stomachaches that often prevented him from attending school, which only exacerbated his learning problems, as he could never catch up with the class.

During the 1960s, the schools in Jamaica were cruel and unforgiving. Children with learning disabilities were called "dunces" and made to sit in the corner or otherwise humiliated. Armstrong was called brain-dead, dummy, duncebat. (PCR-1. 1335.) Corporal punishment was routinely inflicted on what we now refer to as special needs children, and beatings were common. Children were beaten with belts and sticks. Teachers would hold the children by their arms and hit them as they tried to escape. (PCR-1. 1336.) Children would be punished for not knowing their school lessons, for having learning disabilities, and for suffering from any sort of physical disability—anything at all that made them different from their peers. Armstrong, who was small for his age with nosebleeds, a stammer, learning disabilities, and seizures, did not stand a chance.

Armstrong's younger brother, Harlo Mayne, would help him with his homework in an attempt to keep him from being beaten, both at school and at home, but to no avail. (PCR-1. 1336.) Armstrong would get beaten at school for being a "dummy," and then receive another beating at home for being "lazy." (PCR-1. 1335-

38.) Although Harlo tried to help Armstrong when he could, their relationship was not without conflict. Once, during an argument, Harlo stabbed Armstrong and Armstrong spent several months in the hospital. (PCR-1. 1343-44.)

At home, Armstrong's life continued to be plagued by violence. When Armstrong was nine, his uncle and his older brother Danny Miller nearly drowned him in a drum of water. When his grandmother pulled him out, he was unconscious and bleeding from the ears. Another time, about a year later, he lost two fingers in an accident while he and Danny were cutting sugar cane with a machete.

Despite his physical limitations and small size, one thing that Armstrong could do well was swim. The Martha Brae River ran behind their house, fast-running and dangerous. Several people drowned in the river, mostly other children, and Armstrong was often tasked with removing the bodies from the river. (PCR-1. 1339.) Sometimes the bodies would not be found until several days later, when the bodies would be swollen and bloated. (PCR-1. 1340.) Naturally this was upsetting to Armstrong, as he was only a teenager himself. (PCR-1. 1341.)

In 1977, when Armstrong was about fifteen, there was a violent political uprising in Falmouth, capital of the parish of Trelawney, about six miles from where Armstrong's family lived. Riots and shootings caused the police to impose a curfew, but still the upheaval continued. (PCR-1. 1344.) By the time Armstrong turned sixteen, Dorrett had emigrated to the United States, leaving him to live with his

grandmother. He stayed in Jamaica with his family for another three years.

In 1980, when Armstrong was seventeen, the next election proved to be even more tumultuous than 1977. The two political parties, on the verge of civil war, fought for control of the ballot boxes that would decide the election. Ballot boxes were routinely stolen by members of the rival party, and many election workers were killed. The seventeen-year-old Armstrong was enlisted to guard ballot boxes, which terrified him, as he was convinced that he would be killed too. (PCR-1. 1346-47.)

Police corruption was rampant, and the people lived in fear of the police. When Armstrong was about nineteen, police arrested him on false robbery charges. During the months of his captivity, the police tortured him, beating him on his toes and the bottoms of his feet with a hammer and tying weights to his genitals. (PCR-1. 1347-48.) They electrocuted him with live wires and knocked out one of his teeth. He was never convicted of a crime, and the police finally released him.

In addition to the lay witnesses who testified about Armstrong's miserable childhood and adolescence, postconviction counsel also presented the testimony of several expert witnesses who testified about Armstrong's multiple head injuries, cognitive deficits, and brain dysfunction, as well as the horrific conditions in which he was raised. None of these witnesses was ever interviewed by defense counsel prior to Armstrong's resentencing proceeding, much less presented to the jury or the court.

Dr. Antoinette Appel, a forensic neuropsychologist, testified that Armstrong has a significant history of grand mal seizures and brain injury, including the trauma to his brain at birth, the intra-cranial hematoma and intra-cranial bleeding at age five months, his near-drowning and loss of consciousness at age nine, being hit in the back of the head with a stone at age eleven, a bicycle accident at age sixteen, and multiple automobile accidents with loss of consciousness. (PCR-1. 1209.) Further, Dr. Appel pointed out that Armstrong's most recent auto accident involving a head injury had occurred in November 1989, approximately three months before the crimes in this case. (PCR-1. 1209-10.) During that period, Armstrong would have been hypo-metabolic, meaning that his brain would not have been functioning normally. (PCR-1. 1210-14.) She also testified about his diminished neurocognitive functioning caused by multiple head traumas and exacerbated by his consumption of lead paint chips as a child. (PCR-1. 1215.)

Dr. Richard Dudley, a clinical psychiatrist, concluded that Armstrong suffered from multiple neuropsychiatric difficulties, including long-standing cognitive deficits resulting from both genetic and traumatic factors, and a history of seizures. (PCR-1. 1261-65.) Additionally, he testified that Armstrong suffered repeated neglect and physical abuse from his caretakers and evidenced many symptoms commonly seen in children suffering from post-traumatic stress disorder and dysthemia (chronic depression), as well as suffering from pica. (PCR-1. 1265-68.)

He explained to the court that the damage to his frontal lobe caused cognitive impairments which interfered with his decision-making abilities. Dr. Dudley opined that those impairments, combined with the multiple traumas he had experienced throughout his life, caused him to be impulsive and hypervigilant, and rendered him incapable of confirming his conduct to the requirements of the law. (PCR-1. 1272-77.) Additionally, Armstrong was suffering from extreme emotional disturbance at the time of the crime. (PCR-1. 1274.)

Dr. Terry Goldberg, a neuropsychologist, conducted a series of neuropsychological tests, as well as intelligence testing. The test results led her to confirm that Armstrong suffers from severe frontal lobe impairments which suggested fundamental deficits in basic information processing, and which corresponded with Dr. Dudley's opinion regarding Armstrong's cognitive deficits and frontal lobe damage. (PCR-152-54.)[2] Further, Armstrong exhibited severe working memory and executive dysfunction, as well as more general cognitive dysfunction including a low IQ (with a full scale IQ of 77) and limited language skills. (PCR-1. 139.) She opined that a person with these impairments would have impaired ability to inhibit impulses in stressful situations, like the crime here. (PCR-

[2] The hearing transcript in the record on appeal begins with volumes 12-13 and then continues in Vols. 9-11. Also, volumes 12 and 13 do not have Bates stamp numbers so this brief will use the (crossed out) transcript page numbers for those volumes, then switches to Bates stamp numbers for volumes 9-11.

1. 152-54.) She also testified that Armstrong's impairments were consistent with brain damage, although such damage would not show up on an EEG. (PCR-1. 151-52.)

Dr. Thomas Hyde, a behavioral neurologist, testified that Armstrong suffers from significant organic brain dysfunction, including frontal lobe, parietal lobe, and temporal lobe damage. (PCR-1. 178-79.) According to Dr. Hyde, the most important part of the brain for regulating behavior is the frontal lobe, and individuals who suffer from frontal lobe dysfunction tend to exhibit impaired judgment, reasoning, and insight, as well as inappropriate emotional responses to difficult situations. (PCR-1. 187-88.) In combination with temporal lobe dysfunction, frontal lobe damage impedes the reasoning process and increases impulsivity, leading to an absence of judgment, reasoning, and insight in stressful situations. (PCR-1. 188.)

Dr. Laurie Gunst is an author with an undergraduate degree in history from the University of New Hampshire, and a master's degree and Ph.D. in Latin American and Caribbean History from Harvard University. (PCR-2. 1839.) She had lived in Jamaica, taught at the University of the West Indies in Kingston, and authored the book *Born Fi' Dead,* an exposé of the secret symbiotic relationship between Jamaica's politicians and its top-ranking outlaws. (PCR-2. 1839.) Dr. Gunst published a number of other articles relating to political and socioeconomic conditions in Jamaica's ghettos and the prospects of the islands in the aftermath of

Prime Minister Michael Manley leaving office in 1982. (PCR-2. 1840.) She also acted as a consultant for the United States government when living in Jamaica:

> [W]hen I lived there for the two years, 1984 to 1986, while I was working on *Born Fi' Dead* . . . . I served as a kind of liaison between the drug gangs in downtown Kingston and the United states Information Service, which was very eager to procure information on the gang underworld for the Drug Enforcement Agency, which was then at work in the island although it had a very low profile presence.

(PCR-2. 1840.) In addition to her work in Jamaica, Dr. Gunst has also taught Caribbean History in the United States (PCR-2. 1839), and served as a consultant expert in Jamaican culture for the District Attorney in New Hampshire. (PCR-2. 1841.)

Dr. Gunst testified about the conditions in Jamaica that she witnessed which would have impacted Armstrong during his childhood and adolescence. (PCR-2. 1338-1413, 1842.) She also testified about the police brutality, poverty, and physical abuse that Armstrong suffered both at home and at school. (PCR-2. 1842.) In preparation for her testimony, she reviewed records, spoke to family members, and interviewed Armstrong. (PCR-2. 1842-43.) Dr. Gunst testified extensively about the dire poverty in which Armstrong grew up, the terrible conditions in the cities, and the endemic violence. She testified that his schooling was "torture" because his learning disability was not recognized and that he was subjected to corporal punishment on a regular basis. (PCR-1. 1401.) Corporal punishment was a way of

life in Jamaica, both at home and in schools, and teachers would beat children on their hands, or take down their pants and beat them with rulers, sticks, or a cat-o-nine-tails. (PCR-1. 1402.) Armstrong was also beaten regularly at home, in a manner that was extreme even by Jamaican standards. (PCR-1. 1403-04.)

Dr. Gunst also testified about the political violence that pervaded Jamaica during Armstrong's adolescence. Armstrong, like many young men of his generation, was forced to guard ballot boxes in the turbulent elections. Many people who guarded ballot boxes were the victims of drive-by shootings which targeted such guards. She also testified about the brutality of the Jamaican police during this time. The police were notorious for committing murder and other acts of violence. Armstrong was a victim of this routine police violence and was tortured while in police custody in Jamaica. Armstrong's experiences were excessive even by the standards of those days. (PCR-1. 1338-1413.)

As Justice Anstead noted in his concurrence in the opinion remanding this case back to the circuit court for a resentencing, postconviction counsel had discovered "substantial important mitigation regarding Armstrong's family and social history." *Armstrong II,* 862 So.2d at 725. Justice Anstead summarized the mitigation that was presented in postconviction:

> The evidence introduced at the evidentiary hearing included but was not limited to the following: (1) that Armstrong suffered from a seizure disorder; (2) that he suffered from extreme poverty while growing up in

> Jamaica; (3) that he suffered from "pica," an eating disorder frequently seen in abused or neglected children, which caused him to eat lead paint, chicken excrement, and dirt; (4) that the accidental amputation of his fingers in a sugar cane accident led to Armstrong being hospitalized for five months and afterwards he kept his hand hidden to avoid being harassed by other children; (5) that Armstrong was routinely and severely physically abused by his binge-drinking stepfather; (6) that he suffered from a learning disability and was often beaten at school for failing to understand his schoolwork; (7) that Armstrong was living in Jamaica during a time when political and social conditions were marked by extreme violence, and Armstrong experienced these conditions first hand; and (8) that Armstrong was arrested by Jamaican police and was brutally tortured before he was released.

Id. at 724, fn. 16 (Anstead, J., specially concurring). Not only was this information available in the 2003 opinion, but it was available to Rowe through the transcripts of the 2001 evidentiary hearing, as well as the subsequent reports of mental health professionals who had evaluated Armstrong at the request of the original resentencing counsel, Hilliard Moldof. Justice Anstead continued to voice his concerns that the dictates of *Wiggins*[3] and the ABA Guidelines were not followed in this case:

> [H]ere, as in Wiggins, . . . it is clear that during his investigation trial counsel did not discover mitigation of the same quantity and quality as that which actually existed and was later introduced at the postconviction evidentiary hearing. Hence, it would be difficult to conclude that counsel's knowledge of the available

[3] *Wiggins v. Smith*, 539 U.S. 510 (2003).

> mitigation was sufficient to make an informed strategic choice on these matters. Without having uncovered the information regarding Armstrong's troubled background, any "strategic choices made after less than complete investigation are reasonable" only to the extent that "reasonable professional judgements support the limitations on investigation."

Id. at 725. Justice Anstead's concurrence ends with his hope that "judges and lawyers will heed the message of *Wiggins*" and "fully investigate the available mitigation so that any decision on whether or not to present such information is made on a reasonable basis." *Id*. Unfortunately for Armstrong, David Rowe failed to heed this warning and ended up presenting an even more truncated and anemic penalty phase than did Armstrong's trial counsel.

The 2007 Resentencing

When David Rowe accepted Armstrong's case, he had never before conducted a capital penalty phase. (PCR-2. 1771.) Although he listed five capital cases in his untitled pleading to the circuit court stating that he was qualified to represent a capital defendant in a resentencing proceeding, none of his five previous capital cases had proceeded to a penalty phase. (DE3, PCR-2. 1768-71, 1876-78.) When asked at the 2014 postconviction evidentiary hearing whether he had tried at least two capital cases to completion as recommended by Florida Rule of Criminal Procedure 3.112 (F) (3), he responded that "[a]ll of the cases that I did were tried to completion. The State dropped them. It's not my fault that the State dropped the

death penalty after the case starts." (PCR-2. 1773.) When asked whether he had attended a continuing legal education program of at least 12 hours duration devoted specifically to the defense of capital cases, as recommended by Rule 3.112 (F) (7), he replied that he had attended a "lunch session" and gotten CLE credit for it. (PCR-2. 1781-82.) His additional "proof of expertise" included the fact that he is "considered an expert on the Jamaica-US Extradition Treaty," that he has "advised both the United States and Jamaica on issues relating to the treaty," and that he "advise[s] CNN, People Magazine And [sic] the BBC on Caribbean Law issues." (DE3, PCR-2. 1878.)

Rowe's co-counsel, Donovan Parker, likewise had no experience conducting a capital penalty phase. Parker filed a motion requesting appointment under the subsection of Florida Rule of Criminal Procedure 3.112 allowing otherwise unqualified attorneys to represent capital defendants under exceptional circumstances. (SE4, PCR-2. 1940-42.) Parker's qualifications were that he "represents many accused felons of Jamaican background" and that he speaks Jamaican patois, as does Armstrong. (PCR-2. 1940-41.) Rowe, who was designated lead counsel, testified at the postconviction evidentiary hearing that he did not know whether any of the felony trials Parker listed in his motion were capital because he was "not familiar with Mr. Parker's practice." (PCR-2. 1779.)

Because Rowe had never conducted a capital penalty phase and had never

undergone any training on how to do so, he was unfamiliar with the techniques necessary to empanel a fair and impartial jury that could vote for life. During voir dire, several jurors revealed that they had personal connections to the issues in the case. Rowe either failed to question them, or asked only minimal questions. Even though the case was a resentencing and would therefore involve primarily mitigation and other penalty phase evidence, Rowe failed to ask a single juror their thoughts or feelings about mitigation; in fact, *he never once uttered the word "mitigation"* throughout the entire voir dire process. (R. 24-400.)

During individual voir dire, which was conducted in the presence of a venire of prospective jurors, Mary Fayed, who was ultimately empaneled as an a juror, expressed doubt about her ability to be fair during questioning by the State. Fayed revealed that several close family connections to law enforcement could inhibit her ability to be fair because she might empathize with the police officer victims in Armstrong's case:

> PROSECUTOR: How do you feel about the death penalty? Are you for the imposition of the death penalty or against it?
>
> FAYED: I'm for it.
>
> PROSECUTOR: Do you personally feel you are capable for voting for the death penalty?
>
> FAYED: After seeing all the evidence and everything, I think I could.

PROSECUTOR: The reason I ask you that question, one of the perspective [sic] jurors this morning, she was for the death penalty watching TV, but did not feel she could do it sitting on a jury?

FAYED: Yeah, I know. I don't know how that—

PROSECUTOR: There is a difference.

FAYED: I know. I also have a close cousin and close friend who that are police officers so.

PROSECUTOR: There is nothing wrong with that. Would that interfere?

FAYED: It might, yeah. Because I would probably think about that, if it was one of them.

PROSECUTOR: So only you can answer that question. Do you feel you could be fair and impartial in this case?

FAYED: Yeah, *I think* I could be fair.

PROSECUTOR: And do you feel that you would be personally capable of voting for the death penalty?

FAYED: Yeah.

(R. 141-142.) (emphasis added). Although she was clear about her ability to recommend a death sentence, Rowe never asked her whether she could vote for life if the circumstances warranted it. In fact, he never asked her a single question. During a sidebar discussion, Rowe made no mention of Fayed's equivocation and

did not attempt to challenge her for cause, or exercise a peremptory challenge. She was seated on the jury.

Another prospective juror, Heather Hedman-Devaughn, revealed that she knew the victim of the attempted murder, Robert Sallustio, because Sallustio's wife was her secretary. (R. 274.) At the time of the crime, the Sallustios were both deputies for the Broward Sheriff's Office. Armstrong was convicted of attempted murder for shooting Deputy Sallustio in the same exchange of gunfire that left Deputy Greeney dead. When questioned by defense counsel, Hedman-Devaughn, a school principal, explained that Mrs. Sallustio was currently her secretary. (R. 274). She also stated that she had "more knowledge" about the situation (R. 275).

> PROSECUTOR: I think you indicated you knew the Sallustios.
>
> HEDMAN-DEVAUGHN: I do know them, yes.
>
> PROSECUTOR: He was a deputy and so was Kim.
>
> HEDMAN-DEVAUGHN: Not anymore. She is my secretary. She works for me few [sic].
>
> PROSECUTOR: How would that affect your ability to be fair and impartial? Would that affect you?
>
> HEDMAN-DEVAUGHN: Well, I already heard in our get-together, I already heard some things about the whole situation.
>
> PROSECUTOR: Okay.

HEDMAN-DEVAUGHN: When you mentioned the name, bingo.

PROSECUTOR: Would that affect your ability to be fair and impartial?

HEDMAN-DEVAUGHN: I believe I can be fair and impartial. It's just that I have more knowledge.

PROSECUTOR: As to the penalty in this case, you are going to hear testimony and view evidence; right?

HEDMAN-DEVAUGHN: Right.

PROSECUTOR: You haven't made up your minds as to the penalty in this case, have you?

HEDMAN-DEVAUGHN: No.

PROSECUTOR: So you can be fair and impartial, correct?

HEDMAN-DEVAUGHN: I can be fair.

(R. 274-275.) Later, she expressed some hesitancy about her ability to be impartial:

PROSECUTOR: And you feel you could be fair and impartial?

HEDMAN-DEVAUGHN: *I am hoping*. With all the information I already know, I feel I can be fair.

(R. 278) (emphasis added). During defense counsel's questioning, she made similar statements about her ability to be fair and impartial:

ROWE: The fact that [Mrs. Sallustio] is

> someone who works with you, do you think you can be fair and impartial in this case?
>
> HEDMAN-DEVAUGHN: *I hope so*. With all the information I know, *I believe* I can be fair.

(R. 279) (emphasis added). Rowe never questioned her further, even though she disclosed a close personal relationship with one of the victims and his family, and she equivocated about her ability to be fair and impartial. She was seated on the jury.

Juror Rachel Wertz revealed that her mother-in-law was a Broward County Sheriff's Deputy who worked at the Broward County Courthouse. (R. 291.) Rowe did not ask whether she would improperly consider her family's connection to the Broward County Sheriff's Office during deliberations, and whether the courtroom presence of a phalanx of Broward County Sheriff's Deputies would affect her ability to be fair and impartial, even though both victims were Broward Sheriff's Deputies, or any other questions to determine whether her personal relationship would impact her ability to be fair and impartial. He did, however, ask if she had been to Jamaica and she stated she had worked at an orphanage in high school. From this, Rowe assumed that "[y]ou know something about Jamaicans, their circumstances and surroundings" and did not question her further. (R. 292.) He did not, however, *ask* her what her feelings were toward Jamaica, or Jamaicans. She was seated on the jury.

Juror Stacey Minchew stated that she had been a witness for the State in the "Weston babysitter case." (R. 188.) Upon questioning by the prosecutor, Juror Minchew said that she did not have any issues with the State Attorney's Office, law enforcement officers, or the criminal justice system. (R. 188.) However, defense counsel never asked her whether she had any issues with defense attorneys, or defendants. In fact, trial counsel failed to ask her any questions at all about her experience with that trial, or her role in it, and she was seated as a juror. The trial court found that she had "no problem determining the penalty knowing that Defendant was already found guilty of murder," because she stated that she could vote for the death penalty. (PCR-2. 1363.) When Rowe asked her how she felt about the death penalty, she responded, "I feel if it is warranted and I feel the facts are there and I've seen reason, I'm not opposed to it." (R. 197.) Rowe never asked her if she could vote for life; instead, he asked her if she had "right now . . . decided against life imprisonment" and whether she'd "made that decision now." She responded, "absolutely not." (R. 197-98.) Then she stated that she had been to Jamaica on vacation, and Rowe ceased questioning her when she said that she had enjoyed her trip there. (R. 198-99.)

Juror Rhonda McKay, who was selected as an alternate, was asked by the court whether she or a family member had been arrested, and she responded, "I am not in contact with my family, but a family member did." (R. 374.) Later, when the

prosecutor asked her, "[y]ou have never been arrested?" she replied, "[n]o." (R. 380.) However, her criminal history revealed an arrest for grand theft and uttering, two third degree felonies, just three years earlier. Trial counsel did not ask her a single question before agreeing to her presence on the jury, so he did not discover the fact that she had lied to the court when she stated that she had never been arrested.

The lower court denied a hearing on this claim. In its order denying relief, the court agreed that "[w]hen the prosecutor further inquired . . . whether [McKay] had ever been arrested, she responded in the negative." (PCR-2. 1357.) The court was completely unconcerned about the fact that Juror McKay had lied to the court, as evidenced by the court's bewildering finding that "[h]er responses to the questions whether she had ever been arrested were consistent and there is no indication that had trial counsel asked her the same question again she would have changed her answer." (PCR-2. 1357-58.) Because Juror McKay was an alternate and did not participate in deliberations, the court found no issue with the fact that she had lied to the court to end up on the jury in the first place. (PCR-2. 1358.)

Juror Gail Bacchus told the prosecutor that she could vote for the death penalty because the defendant was "in a situation." (R. 238.) Trial counsel neglected to explore this rather odd comment further; indeed, he never asked Juror Bacchus a single question, and she was seated on the jury.

The lower court summarily denied all of Armstrong's juror claims, but one:

the court granted a hearing on the subclaim regarding Juror Bacchus's comment about being able to vote for death because Armstrong was "in a situation." The court's order denying relief indicated that it granted a truncated hearing on this one subclaim because "defense counsel's strategic reason for not questioning juror Bacchus regarding her vague statement was not apparent from the face of the record." (PCR-2. 1361.) At the evidentiary hearing, Rowe testified that his strategy was to focus on empaneling a jury which had "as many black or nonwhite jurors on it as possible," and failing that, Rowe intended to focus on "younger white females." (PCR-2. 1787.) When asked whether he discussed mitigation with potential jurors, he replied, "[n]ot with all of them, no." In fact, he did not ask a single juror a single question about mitigation and never even uttered the word throughout the entirety of the voir dire process, even though this was a resentencing that would consist only of a penalty phase, not a guilt phase. When asked by postconviction counsel whether he discussed with jurors how they should use mitigation, the court sustained a relevance objection by the State because the court had granted only a limited hearing. (PCR-2. 1788.) Postconviction counsel was prohibited from asking any questions about Rowe's voir dire strategy, except with respect to Juror Bacchus.

Rowe stated that he "really wanted her" as a juror because she was "black or brown" and "probably Caribbean—almost certain of Caribbean descent" because of her last name, and for that reason, he "thought that she would be a good juror."

(PCR-2. 1789.) Although Rowe guessed that she might have been Caribbean, he never asked her about her heritage. Regarding her statement to the prosecutor that she could vote for the death penalty because the defendant was "in a situation," Rowe stated that it was a "bland remark . . . that can mean in Caribbean terms that he's in a problem, in a difficulty." (PCR-2. at 1790.) However, Rowe never asked her what she meant, he merely speculated as to what she might have meant. (PCR-2. 1791.) He did not ask her about her feelings regarding the death penalty. (PCR-2. 1791.) He did not ask her how she felt about mitigation—or indeed, whether she even knew what mitigation was. (PCR-2. 1791.) He did not ask her whether she could vote for life if the mitigation outweighed the aggravators. (PCR-2. 1792.) He never asked her what she thought about fellow immigrants who commit crimes. In fact, he did not ask her a single question. (PCR-2. 1792.) He simply decided he wanted her on the jury because she was (probably) Caribbean.

When Rowe took over Armstrong's case, he was in the enviable position of having a solid blueprint in place, formulated over fifteen years of investigation and well-developed mitigation. Yet he presented none of it. He did not interview any members of any of Armstrong's prior defense teams, and he never spoke to any of the prior expert witnesses. (PCR-2. 1784-85.) He did not request any additional evaluation of his client, despite a well-documented history of cognitive deficits, brain injuries, and mental health issues. There is no evidence in the record to suggest

that Rowe employed either a mental health professional or a mitigation specialist, even though the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases state that the defense team should include both, as well as "at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments." Guideline 4.1(A)(1), 4.1(A)(2) (February 2003). When asked whether he was familiar with the guidelines with respect to capital cases, Rowe stated that he had "seen the ABA Guidelines. I know the ABA." (PCR-2. 1785.)

Although Rowe's strategy was by no means clear from the case he presented at resentencing, he made several comments to the court indicating that his defense was that Armstrong's participation in the crime was relatively minor, and that the State's physical evidence was either tainted or inadmissible. Basically, he intended to re-litigate the guilt phase. ("[I]t is clear there was a shoot-out and his participation and infringements in the chain of custody" (R. 1026); "the defense is saying circumstances led him to be in the situation" (R. 1026); "[w]e are going to try to establish the mitigating factors, arguing along the lines of there was, in fact, a shoot-out" (RT. 1027); "[w]hat really happened, was that he was a minor participant in a shoot out. The minor participant in a shoot out be [sic] subjected to the death penalty" (R. 1379)).

Although counsel chose to pursue the doomed defense that Armstrong was a minor participant, they failed to call the one other witness who was present at the crime scene, who would have testified that Armstrong was not the dominant actor: Kay Allen ("Allen").[4] Beginning with her first statement to Broward Sheriff's Office the night of the incident, Allen repeatedly and consistently stated that it was Wayne Coleman, Armstrong's co-defendant, who threatened her, held a gun to her head, called her a "bitch," and made her fear for her life.

In her February 17, 1990 statement to Broward Sheriff's Office, immediately after the crime occurred, Allen told police that Coleman ordered her out of the car, called her a bitch, and held a gun on her throughout the incident. (PCR-2. 1749.) In her October 9, 1990 deposition, she again testified that Coleman pointed his gun at her, said, "bitch, get out of the car," and kept his gun pointed at her. (PCR-2. 1750-51.) Then at Coleman's trial in January 1991, she testified that Coleman said, "So, bitch, you want to play rough" while pointing his gun at her the entire time, forced her lie down on the ground and fired the gun from behind her. (PCR-2. 1753.) She testified to the same facts at Armstrong's trial, and that she gave Coleman the money because she knew he was going to kill her. (PCR-2. 1754-55.) Again, at Armstrong's motion for a new trial on June 1991, she testified that Coleman pointed a gun at her

[4] Ms. Allen's legal name is Kengeral Allen-Scott. However, due to the fact that her name appears as "Kay Allen" throughout the case, this pleading will refer to her as "Allen."

and said "bitch, get out of the car," and that she gave him the money because he was holding a gun to her head. (PCR-2. 1755.) Allen also made a handwritten statement which was incorporated into the PSI prepared to assist the judge in sentencing for her perjury charge. (SE 2, PCR-2. 1916-38.) When the court accepted her plea of no contest, the prosecutor stated that they "believed everything in her statement." (PCR-2.1759-60.) In her statement, Allen wrote that Coleman wasn't going to back down and that he was going to blow her co-workers' heads off if she did not cooperate. She also stated that Coleman came to her side of the car, said "bitch, get out of the car" while pointing his gun at her. (PCR-2. 1756, SE 2.)

On October 21, 2004, Allen provided a statement to a defense investigator indicating that not only was Armstrong not the main aggressor, but also that the State had pressured her into testifying that he was. (PCR-2. 1327-44.) She told the investigator that it was Coleman whom she feared the most; that he was the person who had robbed her, and that he was the main aggressor during the crime. (PCR-2. 1335.) She stated that it was Coleman who came out from the restaurant and ordered her inside, calling her a "bitch." (PCR-2. 1331.) Coleman looked "very aggressive" and she believed that if the police hadn't come, Coleman would have killed her. (PCR-2. 1332.) He would have killed "[e]veryone and anyone." (PCR-2. 1333.) When she told law enforcement officers that Coleman had fired the first shot and that it was Coleman who wouldn't back down, they "didn't want to hear it in no way,

shape, or form." (PCR-2. 1340.) They "want[ed her] to say that Lance was the aggressor when he wasn't." (PCR-2. 1340.) When she told them that she hadn't seen Armstrong fire a shot, they told her that she was going to "fuck up the case." (PCR-2. 1337.)

Rowe was aware of Allen's 2004 statement. He testified at the 2014 evidentiary hearing that Allen's 2004 statement was included in the files he had received from Armstrong's prior attorney, Hilliard Moldof. (PCR-2. 1795.) Moldof's testimony corroborated this. (PCR-2. 1677.) However, Rowe also stated that he had never met Allen, and had never spoken to her. (PCR-2. 1793.) Although Rowe stated that his investigators were not able to find her, Allen testified that she delivered packages to Rowe's office as part of her job as a Federal Express deliveryperson. (PCR-2. 1697.) She stated that she saw Armstrong's files on his desk one day and identified herself to him as Kay Allen, the manager at the restaurant the night of the crime. Rowe did not discuss the case with her further, nor did he obtain contact information to contact her in the future. (PCR-2. 1697-98.)

Allen testified at the 2014 evidentiary hearing. Her testimony regarding Coleman's role as the main aggressor in the crime was consistent in every statement she ever made throughout the pendency of this case. Although the State made many attempts to impeach Allen with minor details from prior statements, none of those purportedly inconsistent statements pertained to the subject matter relevant to

Rowe's theory of defense, which was that Coleman was the primary aggressor, not Armstrong. For example, the prosecutor spent a great deal of time at the 2014 evidentiary hearing "impeaching" Allen about whether she had actually used the word "bloodshot" to describe Coleman's eyes, or if she had only stated that his eyes "looked like he was on something." (PCR-2. 1712-1716, 1723-26.) However, Allen was never impeached on her statements regarding Coleman's role as the primary aggressor, which are the statements most relevant to Rowe's theory of defense. Because Rowe attempted to assert a "minor participant" defense, the fact that Coleman was the primary aggressor was paramount for him to establish to the jury. Allen's assertion that it was Coleman who made her fear for her life, and not Armstrong, never wavered.

Despite the fact that he had never spoken to her, Rowe opined that Allen would be a "very dangerous witness" because she had made an inconsistent statement about whether Armstrong had reached under the seat of the car and pulled out a gun. As a result, she was charged with perjury in 1992 by State Attorney Michael Satz, who was furious with her for jeopardizing his case against Armstrong. (PCR-2. 1795-96.) However, as she had no prior criminal record, she received a withhold of adjudication and was never convicted. Rowe testified incorrectly that she had "been charged and tried for perjury," evaded the question of whether he had ever investigated her charges, and stated—again, incorrectly—that Allen had "done

time" for perjury. (PCR-2. 1796-97.) He also did not know the significance of a withhold versus an adjudication. (PCR-2. 1796.) Rowe never investigated Allen's charges or spoke to her.

At Armstrong's resentencing, the State presented thirty-one fact witnesses and two victim impact witnesses, including the victim's sister and a former colleague who notified the victim's family that he had been killed in the line of duty. The large majority of the testimony consisted of guilt phase evidence from Armstrong's first trial. In fact, of the thirty-three witnesses who testified at the resentencing, all but four of them testified at Armstrong's original trial, including Deputy Sallustio, who had sustained multiple gunshot wounds and barely escaped with his life.

In response, Rowe presented the testimony of three people to the jury: Dr. Michael Morrison, a Jamaican medical doctor who testified about a benign tumor in Armstrong's groin (R. 1353-73); Dr. Rupert Rhodd, a professor of economics who testified about the Jamaican economy in the 1970s and '80s (R. 1051-76); and Armstrong himself. (R. 1076-1342.) That was the extent of the mitigation case that was presented to Armstrong's sentencing jury. By way of explanation as to why he did not present any additional available mitigation including the testimony of multiple mental health professionals, Rowe responded, "[w]e are not required to use any previous attorney's defense. I'm a qualified attorney. I have had several capital matters, both state and federal. . . . We're not bringing in that he was schizophrenic."

(R. 1026.)

After Armstrong testified at his resentencing, the court inquired about his understanding of the mitigation that was available to him, and whether he intended to waive it:

> THE COURT: Armstrong, you have no additional mitigation to present; is that correct?
>
> ARMSTRONG: Excuse me, one moment.
>
> THE COURT: Yes, sir. Talk to your counsel.
>
> ROWE: Give us two minutes.
>
> THE COURT: Yes, sir.
>
> ARMSTRONG: Not at this moment.
>
> THE COURT: Armstrong this is the moment. There are no additional moments. Your attorney has rested the defense at this point. If there is additional mitigation that you want to present, now is the time to present it.
>
> ARMSTRONG: I don't have anything further, your Honor.
>
> THE COURT: You have nothing further?
>
> ARMSTRONG: No.
>
> THE COURT: You discussed your strategies and defense in this matter; is that correct?
>
> ARMSTRONG: Yes, your Honor.

(R. 1374.) At that point, Rowe requested a sidebar, where the prosecutor urged the court to conduct a full colloquy with Armstrong present, to ensure that he understood

what he was waiving. The following exchange occurred, outside of Armstrong's presence:

> ROWE: He already said that there is no further mitigation to put on. So again, I'm just asking for the purpose of our moving the matter along. We agreed what Boyd says—we agreed what our strategy is and he said no further mitigation. I'm not sure what you are going to do with further voir dire when you said that you have no further mitigation. Do you mean you have no more mitigation beyond what remedy Boyd is going to lead to? Other than you asking him again which you already done in front of anybody, do you have any further mitigation? What is the remedy that further voir dire Armstrong will lead to another warning?
>
> THE COURT: Excuse me?

(R. 1376.) Later in the same conversation—still outside of Armstrong's presence—the following exchange occurred, after the court and the prosecutor again suggested a colloquy to ensure a valid waiver:

> ROWE: [Armstrong] said he's not mad.
>
> THE COURT: He's not what?
>
> ROWE: Crazy. That the state attorneys and defense attorneys who are corroborating [sic] together to make him say he was mad. What really happened, was that he was a minor participant in a shoot out. The minor

> participant in a shoot out be [sic] subjected to the death penalty.

(R. 1379.) Finally, the court asked Armstrong a series of leading questions, designed to obtain yes or no answers:

> THE COURT: Armstrong, as I indicated before this is your opportunity before the jury to present mitigation that you might have. Do you understand that?
>
> ARMSTRONG: Yes, your Honor.
>
> THE COURT: You had the opportunity if you so desired to call family and/or friends to testify on your behalf?
>
> ARMSTRONG: Yes.
>
> THE COURT: You elected not to call them on your behalf?
>
> ARMSTRONG: Yes.
>
> THE COURT: Additionally, you raised a 3.850 which was a three day evidentiary hearing raised before Judge Cohn, if I'm not mistaken, which raised mental health issues regarding a brain injury and post traumatic stress disorder. Do you understand that?
>
> ARMSTRONG: Yes.
>
> THE COURT: The 3.850 trial counsel was ineffective to present that evidence at the time of your first trial; is that correct?

ARMSTRONG: Yes.

THE COURT: You elected not to present that evidence at this trial; is that correct?

ARMSTRONG: Yes.

THE COURT: You had an opportunity to talk to Rowe, talk to Mr. Parker in formulating your defense, is that correct?

ARMSTRONG: Yes.

THE COURT: Have they answered all questions that you might have concerning your defense?

ARMSTRONG: Yes.

THE COURT: This is the defense that you want to present by way of mitigation; is that correct?

ARMSTRONG: Yes.

THE COURT: You have no further mitigation to present; is that correct?

ARMSTRONG: The only thing that I did not present is the prosecutor—the only thing that I did not present before is the prosecutor, Ms. McCann, because I did file a bar complaint and an ethnic [sic] complaint against Mr. Satz and Ms. McCann. That's the only thing that I did not present. But that's just about all I wanted to present.

THE COURT: When you say, "just about," is there any other mitigation that you have to present to the Court?

ARMSTRONG: Prosecutor's misconduct, that's it.

THE COURT: Is there a recognized mitigator for alleged prosecutorial misconduct? I'm not aware of any, Rowe?

ROWE: I know there is a case in the State of Florida that suggests prosecutorial misconduct is of itself a mitigator. Dealing with the question if there is misconduct is not a position that the defense has taken during this trial. If you're asking me on a third basis, I believe prosecutorial [sic] could be captured under the catchall provision.

(R. 1384-85.) The trial court found that Armstrong's waiver was knowing, intelligent, and voluntary, based in part upon a "discussion on the record regarding the decision not to present mental health mitigation to the jury." (PCR-2. 1367.) However, this "extensive dialogue transpired between the attorneys of record and the court" at sidebar, outside of Armstrong's presence. (PCR-2. 1367, R. 1019-32.) During that discussion, Rowe indicated that he "didn't think th[e] Court [was] obligated to voir dire Armstrong on [the issue of mitigation]" and that he was "going to try to establish the mitigating factors, arguing along the lines of there was, in fact, a shoot-out." (R. 1027.) He continued that he had "taken the facts in clarity" and the

he was "not going to defraud [the] jury by trying to say things not presented." (R. 1027.)

During Rowe's closing argument to the jury, he stated that he and Armstrong found the victim's death "distressing" and that he had "earned the right to be buried in the nations [sic] most distinguished cemetery." (R. 1437.) He then told the jury that Sallustio had fired 19 shots into the restaurant, and that police had "initiated the confrontation," in effect blaming the victims for what happened that night. (R. 1438.) Next he explained to the jury that in 1980 when Armstrong came to the United States, "Jamaica was in the grip of a cold war . . . between the United States and Russia. A cold war that was started by Dee Atchison, sweetened by Henry Kissinger and served up to Jamaica by Fidel Castro." (R. 1439.) Rowe then stated that it was "uncontroverted that there were bigamists operating for Fidel Castro in the 1980s. And that the CIA, Central Intelligence Agents introduced guns into Jamaica that were used by the Jamaica police force in a confrontation against." (R. 1440.) All of this was to explain "how young Jamaican men learn about .9 millimeters that are not manufactured in Jamaica, they're manufactured in the United States where they are exported to Jamaica sometimes by Central Intelligent people, sometimes by others, other agents." (R. 1440.)

Rowe continued to describe in a garbled and confusing fashion the events of the robbery, suggesting that "the prosecution's reconstruction [did not] bear

common sense evaluation." (R. 1442.) At times, Rowe's struggles with the English language made his rhetoric nearly incomprehensible:

> Now Armstrong testified that when the police arrived, as Mr. Coleman suggested let's rob the place. Armstrong said you're mad. That's consistent with Armstrong. Armstrong who worked with Rafting in Jamaica. So he knows Americans. He's familiar with America. He's assisting tourists. He is building houses in the United States. . . . He was building buildings and complying with laws. He bought guns compliance to laws. Who is one who is likely to have fired in a wild and stupid manner? Coleman, the person who had little education and just came from Jamaica or Armstrong who like the prosecution said had found the American dream?
>
> Here is a guy and look where he was coming from. A place where his kitchen and his bathroom were in the same place. He left that place and came to the United States and developed in the construction business to the point where he was buying new cars. Yes, he had girlfriends. Getting contracts to build. Getting to know how to pull permits.
>
> That guy is not a wild shooter. Remember at the time that Armstrong applied for the permits he was approved by FDLE, he was approved by ATF, pawn broker, state of Florida, federal government. Everybody approved it. This is not a wild and crazy guy. This is a guy that is doing business.

(R. 1442-43.) Throughout his closing, Rowe continued to blame the victims, even going so far as to suggest that Officer Sallustio, who was nearly killed that night, had lied, to frame Armstrong:

> [W]hen you look at those aggravators, it is a very, very mercury pool supported by only one witness of fact who has some reason not to tell the truth because he's a police

> officer who is on the scene, fires 19 shots, one police officer is dead. Yeah, blame it on Armstrong. That's a way to get out of it. Judge will tell you to look to see who has the reason to tell the truth.

(R. 1450.)

As for mitigation, Rowe stated that Armstrong had "[n]o criminal background activity" because a pawnbroker had testified that Armstrong had passed the background check he had run before selling him a gun. (R. 1450.) He also told the jury that Armstrong "at 26 years was still a very young man when all of this occurred" and that he had made the mistake of going off with Coleman (his co-defendant). (R. 1451.) Rowe mentioned "Armstrong's role as a police officer," which meant that he "had the experience of being under fire" and that he was "somebody of law enforcement, of national interest while serving in Jamaica." (R. 1451.) Rowe talked about the "lemon-sized growth in his groin" which had grown to be that size because Armstrong had been mistreated on death row. (R. 1451-52.) Finally, Rowe likened Armstrong's situation to Officer Greeney's because they both "left family and that's tragic" but that the jury should not "go ahead and decapitate the black family." (R. 1452.) He closed his argument with the following:

> The darkness, shot on both sides. Both sides wounded. When you search your heart or you look at the mitigator, this is not a death case.
>
> A police officer was shot, it is unfortunate. That does not make it in and of itself a death case. That should not be the case.

> We must at some point start deciding if we're going to treat people with compassion or not. We can go back. I've been hearing on television all this week, life is important.
>
> Let's choose life.

(R. 1454.)

After the jury returned a recommendation of death by a vote of nine to three, Armstrong filed a motion to discharge Rowe as counsel. He claimed that he had asked Rowe to contact several witnesses and that Rowe hadn't done so. Armstrong named the following witnesses: Kay Allen, Dorret English, Arlene Foster, Superintendent Clinton Lynn Veran, Render [sic] Armstrong, Vance Carter, Oliver Allicock, Davis Massar, Robert Gordon, Wally Dunkin, Tony Mangrieve, Patsy Gray, Gerald, Neva Foster, Elliott Gray, Fayann, Dennys Dunkin, Ruth Banks, Eva Hutchinson, Milton Beach, Wayne Coleman, Marcel Foster, Pamela Weir Mitchell, Adrian Lawson, Danny Miller, Ean Swavey, and Ariel Valentine. (R. Vol. 35 at 9-11.) Armstrong also told the court that he had asked Rowe for a copy of the witness list from the 2001 hearing so that he could recall some of the expert witnesses and "a few other witness which are not listed" but had never received one. (Vol. 35 at 11.)

Despite Armstrong's plea to the court, the trial court found that his claim that his counsel failed to investigate the available mitigation was "nothing more than a mere disagreement with the strategy chosen by his counsel during resentencing" and

summarily denied the claim. (PCR-2. 1379.)

STANDARD OF REVIEW

The standard of review for a trial court's ruling on an ineffectiveness claim is two-pronged: The appellate court must defer to the trial court's findings on factual issues but must review the court's ultimate conclusions on the deficiency and prejudice prongs de novo. *Bruno v. State*, 807 So. 2d 55, 61-62 (Fla. 2001).

ARGUMENT I

ARMSTRONG RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT HIS RESENTENCING IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

The Sixth Amendment guarantees criminal defendants the right to the effective assistance of counsel. In order to obtain a new sentencing, Armstrong must show that his attorneys rendered deficient performance and that he was prejudiced by it. *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail under *Strickland*, Armstrong must show that his counsel's representation fell below an objective standard of reasonableness. To establish prejudice, he must show that but for his counsel's unprofessional errors, there is a reasonable probability he would have received a different sentence. *Id.* at 694. A reasonable probability is determined by considering the totality of available mitigation evidence adduced at trial and during

the habeas proceeding and reweighing it against the aggravators. *Porter v. McCollum*, 558 U.S. 30, 41 (2009), quoting *Williams v. Taylor*, 529 U.S. 362, 397-98 (2000). But for counsel's inadequate performance, there is a reasonable probability that there would have been a different outcome; as it was, three jurors recommended a life sentence.

The fact that resentencing counsel presented some mitigation does not preclude a finding of deficient performance and prejudice. In *Sears v. Upton*, 561 U.S. 945 (2010), the United States Supreme Court held that there can still be deficient performance and prejudice, even when counsel presents some mitigation evidence at trial. The Court explained:

> [w]e have never limited the prejudice inquiry under *Strickland* to cases in which there was only "little or no mitigation evidence" presented. . . . we also have found deficiency and prejudice in other cases in which counsel presented what could be described as a superficially reasonable mitigation theory during the penalty phase.
>
> ***
>
> We certainly have never held that counsel's effort to present some mitigation evidence should foreclose an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant. . . . And, in *Porter*, we recently explained:
>
> > "To assess [the] probability [of a different outcome under *Strickland*, we consider the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding—and reweig[h] it against the evidence in

> aggravation." 558 U.S., at ---- [, 130 S. Ct., at 453-54] (internal quotation marks omitted; third alteration in original).
>
> That same standard applies—and will necessarily require a court to "speculate" as to the effect of the new evidence—regardless of how much or how little mitigation evidence was presented during the initial penalty phase. . . . In all circumstances, this is the proper prejudice standard for evaluating a claim of ineffective representation in the context of a penalty phase mitigation investigation.

Sears, 561 U.S. at 945 (footnotes and internal citations omitted). Thus, the trial court was required to **speculate** as to the effect of unpresented mitigation evidence and determine whether there is a reasonable probability that the defendant would have received a different sentence, or risk failing to engage with the evidence in violation of the defendant's constitutional rights. *Id*. (emphasis added) *See also Porter*, 558 U.S. at 44.

Here, the trial court did not engage in the requisite analysis. Instead, the trial court summarily denied the claim, then embarked on a piecemeal analysis of the evidence presented at the 2001 evidentiary hearing. The court found that "the testimony of the four mental health experts who testified during the 2001 postconviction proceedings . . . would not have undermined confidence in the sentence because 'it was apparent to this Court that none of the three experts called had an accurate understanding or grasp of the salient facts of the crimes for which the Defendant was convicted.'" (PCR-2. 1380.) The court found the testimony

regarding Armstrong's frontal lobe dysfunction incredible because he had "intentionally placed himself in this stressful situation where it was likely that police would respond," and therefore the shooting could not have been impulsive. (PCR-2. 1380-81.)

Regarding the lay witness testimony, the court found that most of it was cumulative to the evidence presented during Armstrong's initial penalty phase in 1991 and therefore would not have made a difference in his sentence. Although the lower court notes in its order denying relief that it was "aware of" the mitigation evidence presented in the earlier proceedings, there is no indication that the court ever considered the potential effect all of the evidence would have had on a jury, nor is there any indication that the court engaged in the cumulative analysis required by *Sears* and *Porter*. (PCR-2. 1383.)

It is absurd to suggest that the voluminous evidence discovered by postconviction counsel and presented in 2001—evidence that Justice Anstead recognized as "important and substantial"— would have made no difference to Armstrong's jury had they heard it, instead of only hearing from two irrelevant, ineffective witnesses and Armstrong himself. Throughout the long and tortuous history of this case, no jury has never heard the wealth of compelling mitigation evidence that exists. No jury has heard from a single expert witness, even though six experts testified at the 2001 evidentiary hearing.

The United States Supreme Court has made clear that "although . . . it is possible that a jury could have heard it all and still have decided on the death penalty, **that is not the test**. It goes without saying that the undiscovered 'mitigating evidence, taken as a whole, "might well have influenced the jury's appraisal" of [Armstrong's] culpability,' and the likelihood of a different result if the evidence had gone in is 'sufficient to undermine confidence in the outcome' actually reached at sentencing." *Rompilla v. Beard*, 545 U.S. 374, 393 (2005) (internal citations omitted) (emphasis added). Armstrong received a 9-3 jury recommendation in favor of death. (RT. 1862-63.) Therefore, if only three more jurors had voted for life, he would have received a life sentence. The lower court must speculate as to whether the unpresented evidence would have influenced at least three jurors to vote for life, and because the court failed to do so, this Court must grant relief.

In *Parker v. State*, 3 So. 3d 974, 983-85 (Fla. 2009) this Court made clear that where trial counsel presents a "bare bones" rendition of some areas of mitigation despite the existence of a wealth of mitigating evidence through available witnesses who were not interviewed and numerous public records that were not sought out, counsel's performance falls below established ABA guidelines. As Justice Anstead noted, "[t]he 1989 ABA Guidelines that the Supreme Court concluded should have guided counsel's investigation in *Wiggins* should have provided similar guidance to Armstrong's counsel." *Armstrong*, 862 So. 2d at 723 (Anstead, J. and Pariente, J.,

dissenting). Unfortunately, that did not happen, and trial counsel made many of the same mistakes as Armstrong's original trial counsel made. The trial court then solidified counsel's errors by failing to conduct a proper prejudice analysis.

Defense counsel unreasonably failed to investigate and present available mitigation because counsel did not understand mitigation himself and could not counsel his client accordingly.

After the State rested and before the defense presentation to the jury began, the State asked the court to colloquy Armstrong regarding mitigation. The prosecutor pointed out that there had been a three-day evidentiary hearing in 2001 where Armstrong's postconviction attorneys had presented thirteen witnesses, including four "esteemed doctors from the National Institute of Health" who had testified on Armstrong's behalf. (RT. 1024.) Rowe responded, "[w]e are not required to use any previous attorney's defense. I'm a qualified attorney. I have had several capital matters, both state and federal. . . . We're not bringing in that he was schizophrenic." (RT. 1026.) This statement shows Rowe's lack of investigation of mental health mitigation, as well as his woeful misunderstanding of Armstrong's case. Armstrong has never been diagnosed with schizophrenia, nor has any such evidence ever been presented at any proceeding. He does, however, have a long history of mental health issues, brain injuries, and cognitive impairments, none of which Rowe explored or presented.

Not only did Rowe fail to present any mental health expert testimony, but he ridiculed the idea of it, despite Armstrong's well-documented history of mental health issues, including a full competency hearing. ("I wouldn't bring in mental health experts who I don't believe is [sic] testifying relevantly to Mr. Armstrong's case" (RT. 1027); "[i]f the defense is saying the circumstances led him to be in the situation, he can't be mad and insane at the same time" (RT. 1026)). To Rowe, mitigation and insanity are one and the same, as evidenced by this exchange:

> ROWE: [Armstrong] said he's not mad.
>
> THE COURT: He's not what?
>
> ROWE: Crazy. That the state attorneys and defense attorneys who are corroborating [sic] together to make him say he was mad. What really happened, was that he was a minor participant in a shoot out. The minor participant in a shoot out be [sic] subjected to the death penalty.

(RT. 1379.) It is obvious from these statements that to Rowe, mitigation and insanity are one and the same, and it stands to reason that if he did not understand the difference, he was not capable of explaining it to Armstrong. Also, Rowe's comments show that he considered mental health mitigation evidence to be tantamount to admitting that Armstrong was "crazy." Rowe's interpretation of the significance of mitigation evidence appears to be the same as Armstrong's, and both evince a deep misunderstanding of the fundamental concept of mitigation.

Because Rowe had never conducted a capital penalty phase nor had he ever been trained in how to do so, he was demonstrably ignorant about the entire concept of mitigation and how to present it. Rowe could not even clearly state his theory of defense to the court during the trial. Rowe told the court that "it was clear there was a shoot-out and his participation and infringements in the chain of custody. We have established a number of things that constitutes [sic] 'humanization of the defendant. . . . We are going to try to establish the mitigating factors, arguing along the lines of there was, in fact, a shoot-out.'" (R. 1026-27.) From a review of the record it seems that Rowe's plan was to re-litigate the guilt phase and show the jury that Armstrong's participation was minimal. At the same time, he claimed that his strategy was to humanize the defendant, which he endeavored to do by presenting Armstrong's testimony, which the lower court characterized as "self-serving" and discounted, a professor who testified generally about Jamaica's economy in the 1970s and '80s, and a medical doctor who testified about a benign tumor in Armstrong's groin.

Further, while he was not "required to use any previous attorney's defense," he certainly *was* required to have a meaningful discussion with his client about mitigation evidence that was available to him. The ABA Guidelines are clear that "[c]ounsel at every stage have an obligation to conduct a full examination of the defense provided to the client at all prior phases of the case. This obligation includes at a minimum interviewing prior counsel and members of the defense team and

examining the files of prior counsel." Guideline 10.7(B)(1). *See also Williams*, 529 U.S. at 395-96 (counsel ineffective for failing to uncover and present evidence of defendant's "nightmarish childhood," borderline mental retardation and good conduct in prison); *Rompilla v. Beard*, 545 U.S. at 383-84 (counsel ineffective for failing to obtain file of prior felony which would be used as aggravator). Despite the existence of volumes of important, substantial mitigation, Rowe never bothered to contact or interview any of Armstrong's prior attorneys. (PCR-2. 1784-85.)

The *Wiggins* Court rejected arguments that Wiggins's defense team made a strategic decision based on the limited investigation they had conducted not to introduce mitigation, commenting that "the 'strategic decision' the state courts and respondents all invoke to justify counsel's limited pursuit of mitigating evidence resembles more a *post-hoc* rationalization of counsel's conduct than an accurate description of their deliberations prior to sentencing." *Wiggins*, 539 U.S. at 526-27. The trial court in this case engaged in the same post-hoc rationalization of counsel's conduct that the United States Supreme Court rejected in *Wiggins*, and this Court should likewise reject it.

The trial court denied this claim without a hearing, finding that Rowe chose a "different" strategy than the one chosen by postconviction counsel and that his strategy of humanizing the defendant is "an accepted strategy that falls within the broad range of competent performance under the prevailing professional standards."

(PCR-2. 1379.) This holds true only when counsel actually presents evidence which would humanize the defendant to a jury. However, in this case Rowe failed to do so even though a wealth of such information was available to him.

Under the ABA Guidelines, there are specific requirements which must be met from the initial appointment on a case through its conclusion. The duty to investigate exists regardless of the expressed desires of a client. The investigation for preparation of the sentencing phase should be conducted *regardless of any statement by the client that evidence bearing upon penalty is not to be collected or presented*. ABA Guideline 10.7(A)(2). *See also Blanco v. Singletary*, 943 F.2d 1477, 1501-03 (11th Cir. 1991) (counsel ineffective for "latch[ing] onto" client's assertions he did not want to call penalty phase witnesses and failing to conduct an investigation sufficient to allow their client to make an informed decision to waive mitigation).

The trial court found that Armstrong's waiver of mitigation was knowing, intelligent and voluntary because he had "sat through his first trial and his first postconviction proceeding during which extensive mitigation evidence was presented. Thus, he was aware of the existing mitigation available to him." (PCR-2. 1376.) However, Armstrong suffers from long-standing cognitive deficits and dyslexia, so his understanding of these proceedings was limited. Further, much of the discussions about what evidence to present or waive were conducted at sidebar,

out of Armstrong's presence. (PCR-1367-69, 1370-71.)

The court found that Armstrong's cognitive deficits and learning disabilities did not prevent him from making a knowing, intelligent, and voluntary waiver in part because Armstrong's eight-hour testimony was so "coherent." However, a review of the record shows otherwise. Armstrong often gave rambling, confusing answers to Rowe's questions, to the point where the prosecutor interrupted to say, "Your Honor, is he still answering the question? I mean, he goes and goes." (R. 1115.) The prosecutor's (and the court's) frustration with Armstrong's incoherent testimony was evident toward the end of Rowe's direct examination, when the prosecutor repeatedly objected to his nonresponsive answers. (R. 1221-27.) Finally, before beginning his direct, the prosecutor stated, "Before I start. Most of my questions are a yes or no answer. And if the witness can't answer, he can say that. If he has to explain the answer, that's fine. But I would object ahead of time to any speeches that are not relevant to my question." (R. 1227-28.) The court also found that Armstrong was "able to withstand the rigors of cross-examination." (PCR-2. 1377-78.) Again, a review of the record proves that this characterization is inaccurate, and in fact it shows the opposite: Armstrong's testimony makes it clear that his impairments impacted his ability to execute a knowing, intelligent, or voluntary waiver.

Rowe was ineffective for failing to challenge the State's case and failing to mount a viable defense.

Counsel was ineffective for failing to take action to prevent the State from relitigating the guilt phase of the original trial at resentencing. The law is clear that the State is not allowed to relitigate guilt during resentencing proceedings. *Way v. State*, 760 So. 2d 903, 917 (Fla. 2000). Although the State may introduce evidence concerning the facts and circumstances of the crime in order to prove the aggravating circumstances, in this case, the State's presentation went far beyond merely proving the aggravators—it was essentially the exact same proceeding as the guilt phase of the original trial. Of the thirty-three witnesses the State called at resentencing, all but four of them testified at the original trial.

The trial court found that this claim was insufficiently pled because Armstrong "does not show what objections trial counsel could have raised to prevent the State from introducing evidence in support of the three aggravators it sought to establish." (PCR-2. 1385.) However, as Armstrong argued in his postconviction motion, the law provides that although the State may introduce some evidence to prove aggravators, it is prohibited from re-litigating the entire guilt phase, as it did here. *See Way*, 760 So. 2d at 917 ("[w]hile the State is not allowed to relitigate guilt during resentencing proceedings, it may introduce evidence concerning the facts and circumstances of the crime in order to prove the aggravating circumstances beyond a reasonable doubt"). Rowe should have filed motions in limine, made legal

argument, and objected to any extraneous evidence to prevent a re-trial of the guilt phase, as Armstrong argued in his postconviction motion. (PCR-2. 249-253.)

Defense counsel had a duty to attack the State's case, and it failed to do so, despite the advantage of knowing the State's strategy from the first trial. *See Rompilla*, 545 U.S. at 383-84. Rowe made several comments to the Court indicating that his defense was that Armstrong's participation in the crime was relatively minor, and that the State's evidence was either tainted or inadmissible. ("[I]t is clear there was a shoot-out and his participation and infringements in the chain of custody" (R. 1026); "the defense is saying circumstances led him to be in the situation" (R. 1026); "[w]e are going to try to establish the mitigating factors, arguing along the lines of there was, in fact, a shoot-out" (R. 1027); "[w]hat really happened, was that he was a minor participant in a shoot out. The minor participant in a shoot out be [sic] subjected to the death penalty" (R. 1379)). Counsel spent an inordinate amount of time at resentencing attacking the chain of custody of bullets and bullet fragments that had been admitted into evidence at the guilt phase of Armstrong's trial. Rather than mounting a viable defense, counsel instead attempted to blunt the force of the State's case by relitigating evidentiary issues that had been already been litigated at trial in 1991. The time to attack the State's strategy of retrying the guilt phase was before the resentencing began. The jury should never have been subjected to the State's guilt phase case all over again, because counsel should not have let it happen.

In addition to Rowe's failure to attack the State's case, Rowe's strategy to paint Armstrong as a minor participant was objectively unreasonable given the facts of the case. The defense may introduce evidence relevant to the "nature and circumstances of the crime," e.g., that the defendant played a relatively minor role in the crime. *Way*, 760 So. 2d at 917. There is also a statutory mitigator available in cases where "[t]he defendant [is] an accomplice in the capital felony committed by another person and his participation was relatively minor." Fla. Stat. 941.141(6)(d). Although the Court gave a jury instruction regarding this mitigator, the jury did not hear any evidence that Armstrong was a minor participant, other than what the lower court referred to as his own "self-serving" testimony. (PCR-1. 784.)

Another statutory mitigator exists where "the defendant acted under extreme duress or under the substantial domination of another person." Fla. Stat. 921.141(6)(e). However, where a jury had already found Armstrong guilty of first degree murder and attempted first degree murder, this defense was not only ill-advised, it was constitutionally ineffective, particularly when the attempted murder victim was present in court to identify Armstrong as the person who shot him. No reasonably competent attorney would mount such a doomed defense, particularly when there was a wealth of mitigation evidence available. Deputy Sallustio testified that Armstrong shot him, and that Armstrong chased him across the parking lot to "finish the job" so that there would be no witnesses (R. 471.)

Since Rowe decided to pursue this ludicrous defense, Rowe's decision not to call Kay Allen was unreasonable, and not based on strategy. A strategic decision can only be made after sufficient investigation, and Rowe never even spoke to her, even though she was the only other witness who was at the scene whose testimony could have bolstered Rowe's defense that Armstrong was only a minor participant and that Coleman was the primary actor. Additionally, Rowe never conducted any research to determine whether her perjury charge would have any impact on her credibility, or the State's ability to impeach her. He testified that he did not know what the disposition of the perjury charge was, which demonstrates that he did not know the legal significance of the fact that she obtained a withhold and not a conviction. (PCR-2. 1796-97.) Had he bothered to actually obtain her case file and do the research, he would have realized that he would have had valid grounds to keep the details of her perjury conviction from the jury.

The law is clear that a party may attack the credibility of any witness by evidence that the witness has been convicted of a crime . . . if the crime involved dishonesty or a false statement. Fla. Stat. § 90.610(1). However, a "conviction" for the purpose of § 90.610(1) requires an adjudication of guilt or judgment of conviction by the trial court. Allen was never convicted, and only received a withhold of adjudication. When adjudication has been withheld, or a person has pled guilty or has been found guilty by a jury but adjudication has not occurred, there has

been no conviction under § 90.610(1) and **the credibility of the witness may not be attacked under this provision**. *State v. McFadden*, 772 So. 2d 1209, 1216 (Fla. 2000) (emphasis added). Allen received a withhold of adjudication, thus her criminal record would have been unavailable for use as impeachment. Although the lower court allowed the State (over defense objection) to impeach her with the perjury withhold, the court's decision was based not on any caselaw or statute, but rather on the fact that the court thought it "[didn't] make sense that the State would not have the right to impeach with reference to the facts and the testimony that was given during the trial." (PCR-2. Supp. 4.) The lower court's decision to allow the State to impeach her with a charge for which she received a withhold is contrary to Florida Statutes § 90.610(1) and this Court's precedent.

Had counsel subpoenaed Allen, she would have been willing and able to testify. (PCR-2. 1698.) If Rowe's defense was that Armstrong was merely a minor participant and was not the dominant actor, there is no strategic reason that could justify this omission. The prejudice to Armstrong is obvious: resentencing counsel went to trial on a theory that Armstrong was a minor participant in the crime, without the one witness who was *at the crime scene* who would have testified to that fact.

It is not enough for an attorney to have a strategic reason for pursuing a particular defense. That strategy must be objectively *reasonable*, under prevailing professional norms. *See Strickland*, 466 U.S. at 688 ("the performance inquiry must

be whether counsel's assistance was reasonable considering all the circumstances"). No reasonably competent capital defense attorney would choose a defense of "minor participant" when his client showed up to rob a restaurant in the wee hours of the morning armed with a .9 millimeter semi-automatic handgun and shot two police officers, one of whom identified him in court as the person who shot and tried to kill him. Rowe's failure to challenge the State's case and present a viable defense prejudiced Armstrong. Relief should issue.

Rowe was ineffective for failing to disclose to Armstrong that he labored under an actual conflict of interest during his capital resentencing proceeding, and for failing to obtain a waiver from Armstrong.

The Sixth Amendment right to counsel assures fairness in adversarial criminal proceedings. *Bouie v. State*, 559 So.2d 1113, 1115 (Fla. 1990); *see United States v. Morrison*, 449 U.S. 361 (1981). An actual conflict of interest that adversely affects counsel's performance violates the Sixth Amendment of the United States Constitution. *Larzelere v. State*, 676 So. 2d 394, 403 (Fla. 1996). This constitutional guarantee includes the right to counsel whose loyalty is not divided between clients with conflicting interests.[5] *Turner v. State*, 340 So. 2d 132, 133 (Fla. 2d DCA 1976);

[5] Rule 4-1.7 of the Rules Regulating the Florida Bar dealing with the issue of conflicts of interest states:

(a) Representing Adverse Interests

Bouie, 559 So.2d at 1115. The mere physical presence of an attorney does not fulfill the Sixth Amendment guarantee when "the advocate's conflicting obligations have effectively sealed his lips on crucial matters." *Holloway v. Arkansas*, 435 U.S. 475, 490 (1978). A defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief. *Cuyler v. Sullivan*, 446 U.S. 335, 349-50 (1980). The conflict itself demonstrates a "denial of the right to have the effective assistance of counsel." *Id*.

> A lawyer shall not represent a client if the representation of that client will be directly adverse to the interests of another client, unless:
>
> (1) the lawyer reasonably believes the representation will not adversely affect the lawyer's responsibilities to and relationship with the other client; and
>
> (2) each client consents after consultation.
>
> **(b) Duty to Avoid Limitation on Independent Professional Judgment**
>
> A lawyer shall not represent a client if the lawyer's exercise of independent professional judgment in the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person or by the lawyer's own interest, unless:
>
> (1) the lawyer reasonably believes the representation will not be adversely affected; and
>
> (2) the client consents after consultation.

at 349, quoting *Glasser v. United States*, 315 U.S. 60, 72-75 (1942) (Frankfurter, J., dissenting).

A defendant's fundamental right to conflict-free counsel can be waived, provided that the record shows that the defendant: (1) was aware of the conflict of interest; (2) realized the conflict could affect the defense; and (3) knew of the right to obtain other counsel. *Larzelere*, 676 So. 2d at 403. Resentencing counsel was laboring under an actual conflict of interest at Armstrong's capital resentencing proceeding, about which Armstrong was entirely unaware. Questions involving conflicts of interest are mixed determinations of law and fact subject to *de novo* review. *United States v. Novaton*, 271 F.3d 968, 1010 (11th Cir. 2001), citing *Porter v. Singletary*, 14 F.3d 554, 561 (11th Cir. 1994).

To establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance. *Cuyler*, 446 U.S. at 348. A lawyer suffers from an actual conflict of interest when he or she actively represent[s] conflicting interests. *Id.* at 350. To demonstrate an actual conflict, the defendant must identify specific evidence in the record that suggests that his or her interests were compromised. *See Herring v. State*, 730 So.2d 1264, 1267 (Fla. 1998).

The lower court granted an evidentiary hearing on Armstrong's claim that there was an actual conflict of interest between Armstrong's resentencing counsel,

David Rowe, and defense expert witness Dr. Laurie Gunst, which was neither disclosed to Armstrong before the penalty phase nor waived by Armstrong. The record of the 2007 resentencing reflects that despite having the transcript of Dr. Gunst's 2001 testimony, Rowe did not call Dr. Gunst to testify at either the resentencing or the *Spencer* hearing. Dr. Gunst testified at the 2013 evidentiary hearing that Rowe never contacted her about the case. (PCR-2. 1844-45.)

At the 2014 evidentiary hearing, Dr. Gunst testified that she had been sued in Jamaica by Edward Seaga, the former Prime Minister of Jamaica, as a result of remarks she had made on an interview on a Jamaican radio station. (PCR-2. 1849.) Dr. Gunst filed suit in federal court in New York against Mr. Seaga, and Rowe represented Mr. Seaga in that case. (PCR-2. 1846.) In both the Jamaica case and his response to the New York lawsuit, Rowe alleged that Dr. Gunst had libeled Seaga on a radio broadcast in Jamaica in 1999. (DE 4, PCR-2. 1892-97.)

Both lawsuits were pending in May 2006, while Rowe was representing Armstrong. The New York lawsuit was ultimately dismissed for lack of subject matter jurisdiction on March 30, 2007. (DE 4.) However, the Jamaica case was never formally closed. Dr. Gunst testified that in May 2005, Rowe, on behalf of Seaga, had sent her a "confusing" letter asking for an apology for her comments on the radio show and at the same time asking her to come to Jamaica to pursue litigation. She refused both requests, both because she stood by her radio remarks, and also because

she did not feel safe traveling to Jamaica to pursue this potential litigation. (PCR-2. 1847.) Thus, when Armstrong's resentencing proceeding began on April 10, 2007, there was still an adversarial relationship which created a conflict for owe as counsel for both Seaga and Armstrong.

Rowe failed to call Dr. Gunst to testify, despite the fact that Dr. Gunst would have been able to offer compelling testimony at Armstrong's resentencing. Furthermore, even if Rowe had sought Dr. Gunst's testimony, she would have refused to do so. Although Armstrong himself contacted Dr. Gunst and asked her to testify at the *Spencer* hearing, Dr. Gunst advised Armstrong that she could not testify on his behalf because of her adversarial relationship with Rowe. (SE 5.) Dr. Gunst's letter to Armstrong lists two reasons for not wanting to come to Florida to testify: both her relationship with Rowe and the fact that she had said all she had to say at the 2001 hearing. However, she clarified that if asked, she would have testified for any other attorney other than Rowe. (PCR-2. 1856.)

At no time before the April 2007 resentencing did Rowe disclose to Armstrong the substance of the proceedings against Dr. Gunst, nor did he disclose the fact that it created a conflict of interest which would cause him to withdraw from the case unless Armstrong waived the conflict. At no time prior to the resentencing was there any waiver of that conflict. Dr. Gunst never testified at any proceeding following the remand for resentencing, until the evidentiary hearing in 2014.

Rowe attempted to belittle Dr. Gunst's expert qualifications by misrepresenting her credentials. He stated that he did not consider her an expert on "Jamaican culture history" because she has "no credentials from a Jamaican or a Caribbean University, in Jamaican sociology, Jamaican history or Jamaican culture." (PCR-2. 1802.) However, given Dr. Gunst's Ph.D. from Harvard in Caribbean history, and her experience teaching at the University of the West Indies in Jamaica, this is misleading to say the least. Rather, Rowe's dislike of Dr. Gunst is a result of personal bias due to his relationship with his client, Edward Seaga, of whom Dr. Gunst had been critical.

At Armstrong's resentencing, Rowe did present some very limited testimony from economist Dr. Rupert Rhodd about the economic conditions in Jamaica when Armstrong lived there. However, Dr. Rhodd's testimony was very general, and did not put Armstrong's social history in context, as Dr. Gunst's testimony had done in 2001. Had Dr. Gunst's testimony been presented to Armstrong's resentencing jury, in addition to the other unpresented evidence, there is a reasonable probability that at least three more jurors would have voted for a life sentence.

The lower court found that Armstrong "failed to establish that Rowe was actively representing conflicting interests and that an actual conflict adversely affected his performance" (PCR-2. 1391-92.). The lower court based this finding in part on the fact that the lawsuit in Federal District Court in New York was dismissed

in March 2007, and that Armstrong's resentencing did not commence until April 10, 2007. (PCR-2. 1392.) However, Rowe filed a notice of appearance in Armstrong's case on May 22, 2006, well before the commencement of the resentencing. (PCR-2. 1874-75.) Whether or not the actual jury proceeding had commenced is irrelevant. During the period he was representing Seaga against Dr. Gunst, Rowe was purportedly investigating and preparing Armstrong's resentencing case.

The lower court further found that Rowe's decision not to call Dr. Gunst was "very well reasoned strategic decision" (PCR-2. 1392), despite the court's recognition that Dr. Gunst "has great credentials." (PCR-2. 1392.) The court based its finding on Rowe's assertions that Dr. Gunst's knowledge was limited to urban Kingston rather than rural Jamaica, and that her real forté was the Shower Posse phenomenon. (PCR-2. 1392-93.) However, as the testimony of both Dr. Gunst and Rowe showed, Rowe never made any attempt to contact Dr. Gunst, despite knowing that she had testified in 2001, and having the transcript of that testimony. (PCR-2. 1802.) His purported knowledge of Dr. Gunst's work was limited and permeated with bias against her.

Regarding the court's failure to seek a waiver on the record regarding this conflict, the court again relied on Rowe's representation that he had discussed Dr. Gunst with Armstrong but failed to put it on the record because "neither him [sic] nor Defendant thought there was any conflict as far as Dr. Gunst was concerned."

(PCR-2. 1392.) Regardless, during the colloquy regarding the alleged waiver of most of the witnesses who had testified in 2001, Armstrong did not waive the right to call Dr. Gunst as a witness. And the fact that he was actively soliciting Dr. Gunst in writing supports the inference that Armstrong wanted her to testify at his resentencing as she had at his first evidentiary hearing.

The lower court found that Armstrong was not prejudiced by Rowe's failure to call Dr. Gunst because her 2001 testimony "covered the same issues as Dr. Rhodd's," even though the court admits that Dr. Gunst's testimony was "more detailed." (PCR-2. 1396.) The court glossed over the fact that while Dr. Rhodd's testimony was more about general conditions in the country, Dr. Gunst was able to personalize her knowledge about Jamaica in the context of Armstrong's life, which gave added depth to his social history. A comparison of the 2007 testimony of Dr. Rhodd against that of Dr. Gunst in 2001 reveals that it is not just the level of detail but the contextualization of the information that is crucial to Armstrong's mitigation case.

The lower court found that "Dr. Gunst's testimony did not establish any additional mitigators that this Court could now consider to reweigh the aggravators and mitigators in this case." (PCR-2. 1397.) However, this is not the test. *Porter* makes it clear that the court must speculate as to the likely effect on the jury of the additional mitigation. As noted *supra*, while Dr. Rhodd spoke about general

conditions in Jamaica, Dr. Gunst was able to weave her knowledge of Jamaican history and culture with Armstrong's life in order to humanize him, which was Rowe's stated defense. (R. 1026.) Armstrong's jury recommended death by a mere 9-3 vote. Had only three more jurors recommended life, Armstrong would have had a life sentence.

Even the heightened constitutional protections inherent in capital criminal prosecutions and the liberty interests at stake, the rules governing an attorney's continuing duty of loyalty and conflicts of interest are undoubtedly nothing less than those required in civil litigation. The Sixth Amendment right to conflict-free counsel is predicated upon the concept that a defendant is entitled to counsel whose loyalty is not divided between clients with conflicting interests. This duty of loyalty is continuing, and extends beyond the initial time period of representation of the client.

Armstrong established that his trial counsel suffered from an actual conflict of interest which adversely affected his counsel's performance. Because Rowe was actively pursuing a lawsuit against Dr. Gunst at the same time that he was representing Armstrong, he was unwilling to present powerful mitigation evidence to the jury. This conflict, and Rowe's continuing duty of loyalty to Seaga, did not cease to exist during Rowe's representation of Armstrong. As a result, Rowe had an obligation to disclose the litigation against Dr. Gunst to Armstrong. Despite this obligation, Rowe failed to disclose the conflict of interest to Armstrong and to obtain

his informed consent before proceeding further in his representation. His failure to do so rendered his performance well below acceptable professional standards and was a violation of Armstrong's Sixth Amendment right to conflict-free counsel.

There is nothing in the record that supports a contention that Rowe ever informed Armstrong of this potential conflict or received his informed consent before proceeding with the representation. At no time prior to, or during the resentencing is there any indication in the record that the Court ever conducted a colloquy about this conflict of interest or that Armstrong provided any form of implied or express waiver. This is simply not a case where an informed waiver resolves the conflict of interest.

Rowe's simultaneous representation of Seaga and Armstrong created an actual conflict of interest which Armstrong never waived. Armstrong was prejudiced by counsel's ineffective performance because the jury was deprived of hearing important mitigation evidence which would have changed the outcome of the proceeding. Relief is warranted.

Rowe was ineffective for failing to challenge jurors who either lied about their criminal histories or were biased against the defense and in favor of the State.

Neither Rowe nor Parker had never conducted a capital penalty phase, and their incompetence and inexperience in choosing a penalty phase jury was painfully obvious from Rowe's performance during voir dire. Throughout the process, while the State methodically ensured that the prospective jurors were death-qualified,

Rowe made no attempt to learn whether any of them were capable of voting for life. Several jurors indicated during voir dire that they were biased against the defense, and Rowe failed to question them, challenge them for cause, or exercise peremptory challenges. As this Court has held, "[i]f counsel knows nothing more of the jurors, the single thing defense counsel must ascertain is whether the prospective jurors can fairly and impartially consider the evidence offered by the defendant." *Barnhill v. State*, 834 So. 2d 836, 846 (Fla. 2002). Rowe's performance was plainly deficient. The ABA Guidelines state that counsel should be familiar with techniques:

> (1) for exposing those prospective jurors who would automatically impose the death penalty following a murder conviction or finding that the defendant is death-eligible, regardless of the individual circumstances of the case;
>
> (2) for uncovering those prospective jurors who are unable to give meaningful consideration to mitigation evidence; and
>
> (3) for rehabilitating potential jurors whose initial indications of opposition to the death penalty make them possibly excludable.

Guideline 10.10.2(B). In this case, Rowe never discussed mitigation with a single juror, and in fact never even uttered the word throughout the entirety of voir dire. Rowe utterly failed in his duty to ensure that Armstrong had a fair and impartial jury, and Armstrong was prejudiced by his failures. Had Rowe done a reasonably adequate job, the result of the proceeding would have been different.

The test for determining juror competency is whether the juror can lay aside any bias or prejudice and render a verdict solely on the evidence presented and the instructions on the law given by the court. *Busby v. State*, 894 So. 2d 88, 95 (Fla. 2004). *See also Irvin v. Dowd*, 366 U.S. 717, 723 (1961) (a juror must be able to lay aside his impression or opinion and render a verdict based on the evidence presented in court). A juror must be excused for cause if any reasonable doubt exists as to whether the juror possesses an impartial state of mind. *Id*.; *Hill v. State*, 477 So. 2d 553, 556 (Fla. 1985). Counsel's failure to challenge or properly preserve a challenge for cause can constitute ineffective assistance of counsel. *See Thompson v. State*, 796 So. 2d 511, 516-17 (Fla. 2001) (remanding for evidentiary hearing on claims of ineffective assistance of counsel for failure to challenge jurors for cause). In the postconviction context, a defendant must demonstrate that a juror was actually biased, meaning "bias-in-fact" that would prevent service as an impartial juror. *Carratelli v. State*, 961 So. 2d 312, 324 (Fla. 2007).

The lower court granted a limited evidentiary hearing on the portion of Armstrong's claim that Rowe was ineffective for failing to inquire of Juror Bacchus what she meant by the statement that she could vote for the death penalty because the defendant was "in a situation." (PCR-2. 1361.) The court summarily denied the remainder of Armstrong's claims with respect to Rowe's conduct of voir dire and the other four jurors who either indicated that they were biased or who outright lied

to the court about their qualifications.

Rowe's decision not to question Juror Bacchus *at all* simply because she was black and he suspected that she might be Caribbean is per se unreasonable. Without questioning each potential juror, counsel can never know whether a juror harbors dangerous bias against the defense, or in favor of the State. Here, Rowe assumed that because she was also Caribbean (which he never ascertained), she would sympathize with Armstrong's situation, when in fact her predilection might be just opposite. Her status as an immigrant may have caused her to be biased against a fellow immigrant who had committed murder. But Rowe never questioned her about it, nor did he ask her a single question, simply because she was black.

Juror McKay, who was selected as an alternate juror, lied to the court about her criminal history. Because Rowe failed to question her, he did not learn about her deception, which was only discovered in postconviction. Incredibly, the lower court did not seem to care about her fraudulent testimony to the court. In its order, the court found that her responses to the questions whether she had ever been arrested were "consistent" even though she stated that she had never been arrested, when in fact she had. The court then speculated that her answer would not have changed even if Rowe had questioned her further. (PCR-2. 1357-58.) The court made much of the fact that she was only an alternate juror and did not participate in deliberations. However, given the fact that she lied to the court about her criminal history, her

ability to follow the court's instructions to not discuss the case or commit any other sort of impropriety is questionable.

Because of her presence on the jury, Armstrong was deprived of his Sixth Amendment right to a fair and impartial jury under state and federal law. *United States v. Perkins*, 748 F.2d 1519, 1533 (11th Cir. 1984), quoting *United States v. Bynum*, 634 F.2d 768, 771 (4th Cir. 1980) ("[W]hen possible non-objectivity is secreted and compounded by the untruthfulness of a potential juror's answer on voir dire, the result is deprivation of the defendant's right to a fair trial."); *Conaway v. Polk*, 453 F.3d 567 (4th Cir. 2006); *see also Chester v. State*, 737 So. 2d 557 (Fla. 1999). Relevant and material facts regarding McKay's criminal history were concealed from trial counsel and the court, therefore inherent prejudice is presumed.

A juror's lack of candor during voir dire which results in the non-disclosure of material information relevant to jury service justifies a new trial as a matter of law. *Chester*, 737 So. 2d at 557. This Court has set out a three-part test for determining whether the nondisclosure of information warrants a new trial: (1) the information must be relevant and material to jury service in the case; (2) the juror concealed information; and (3) the failure to disclose was not attributable to lack of due diligence. *De La Rosa v. Zequeira*, 659 So. 2d 239 (Fla. 1995).

Armstrong had a right to know about Juror McKay's criminal charges and should have been entitled to question her on this material fact. The omission of this

relevant information prevented counsel from making an informed judgment-which in all likelihood would have resulted in a valid cause challenge. Had trial counsel known a juror had been charged with two third degree felonies, he would or should have moved to strike her for cause, and if not successful, used one of his peremptory challenges to excuse her from the jury.

Based on the juror misconduct in concealing facts that were relevant and material from trial counsel during voir dire and through the conclusion of the resentencing, inherent prejudice is presumed. Armstrong was prejudiced when relevant and material facts regarding Juror McKay's criminal history were concealed from trial counsel and the court, and therefore Armstrong is entitled to relief. *Young v. State*, 720 So. 2d 1101, 1103 (Fla. 3d DCA 1998); *see also Lowrey v. State*, 705 So. 2d 1367 (Fla. 1998).

Juror Fayed's statement that she would "probably" be thinking about her cousin and her close friend, who were police officers, during deliberations should have raised a reasonable doubt as to her impartiality. *See Hill*, 477 So. 2d at 555, quoting *Singer v. State*, 109 So. 2d 7, 24 (Fla. 1959) ("[I]f there is a basis for any reasonable doubt as to any juror's possessing that state of mind which will enable him to render an impartial verdict based solely on the evidence submitted and the law announced at trial, he should be excused on motion of a party, or by [the] court on its own motion"). Armstrong was biased by her presence on the jury, and Rowe

should have moved to excuse her for cause. Both victims were police officers, and the fact that she stated she would "probably" be thinking about her friends was not vitiated by her later statements that she could be fair and impartial. If a cause challenge was not granted, competent counsel would have used a preemptory challenge to remove her from consideration. When the prosecutor asked her whether her personal relationships with police officers would interfere with her ability to serve as a juror, she replied, "It might, yeah. Because I would probably think about that, if it was one of them." (R. 142.) Next the prosecutor stated, "So only you can answer that question. Do you feel you could be fair and impartial in this case?" and she replied, "Yeah. *I think* I could be fair." (R. 142.) Later, upon further questioning by the prosecutor, she stated "yeah" when asked whether she could be fair and impartial. Despite her equivocation, Rowe never asked her a single question.

Similarly, Juror Hedman-Devaughn expressed doubt about her ability to be fair after disclosing that Officer Sallustio's wife was currently her secretary. During questioning by Rowe, she stated that she knew that "the person [she knew] was shot six times by the accused here today." She also admitted that she knew Mrs. Sallustio and her husband, and stated that with all the information she knew, she "believed" she could be fair. (R. 279.) The record indicates that Armstrong may have had some concerns about her, as one of the prosecutors mentioned at sidebar:

> PROSECUTOR: At some point I know Mr. Parker, as we were waiting for them to come up

here, they were at counsel's table discussing with the defendant this latest juror questioned, Ms. Heather Hedman-Devaughn. In so much as she knew something about the case, at some point I think the defendant – have you spoken with him?"

ROWE: No. I just read the list.

PROSECUTOR: Armstrong is okay with having her on?

ROWE: I spoke with him. He knows everything that's going on. I specifically took the time before to explain it to him.

(R. 280.) Rowe's answer was vague and nonresponsive, and the prosecutor's concern seemed to suggest that Armstrong did, in fact, appear to have an issue with Hedman-Devaughn. Also, Rowe never ascertained that she could definitively be fair and impartial toward the defense given her personal relationships. The trial court found that "[t]he record does not support Defendant's allegation that juror Hedman-Devaughn had a close personal relationship with Deputy Sallustio and his family." (PCR-2. 1360.) However, her testimony during voir dire shows that she did, in fact, know them both well, and that those relationships would have some effect on her impartiality. Rowe's questioning did not establish that she could be fair or impartial toward the defense; in fact, his question left open the issue of whether her personal relationships would affect her. He asked, "[o]ther than your knowledge of some of the players, is there any other reason why you don't think you could be fair?" and

she replied, “no.” (R. 279.) Prior to that, she stated that she “hoped” she could be fair, and that she “believed” she could be fair. (R. 279.) Rowe should have challenged her for cause, or at least used a peremptory to remove her from the jury, given her knowledge of the victim’s family and her equivocation.

Juror Rachel Wertz, whose mother-in-law worked as a Broward Sheriff’s Office deputy, was asked a series of questions by Rowe which told him nothing about her potential biases. Although he ascertained that her mother-in-law was a deputy in the courthouse, he never asked her whether that relationship would affect her during deliberations. He merely asked her which judge her mother-in-law worked for. (R. 291.) He then asked if she understood the gravity of the situation, and whether she was “capable emotionally” to handle it. She responded in the affirmative. (R. 291.) Next he asked if she would listen to the evidence and instructions and wait until the end of the case to make a decision, and she said that she would. (R. 292.) Lastly, he assumed that she “knew something about Jamaicans, their circumstances and surroundings,” because she told him she had worked in a Jamaican orphanage when she was in high school. (R. 292.) Rowe never asked her whether her personal relationship would affect her, nor did he bother to ask what her feelings actually were about Jamaica or Jamaicans, given her experience there.

Juror Stacey Minchew’s experience as a State witness in a previous trial should have raised serious concerns for Rowe, but it did not. Although she told the

prosecutor that she had no negative feelings toward police or prosecutors after that experience, Rowe never asked how she felt about defense attorneys, or defendants, or whether those feelings would affect her in this case. The trial court found that she had "no problem determining the penalty knowing that Defendant was already found guilty of murder," because she stated that she could vote for the death penalty. (PCR-2. 1363.) Again, as with the other jurors who were either biased or who lied to the court, Rowe never asked her whether she could vote for life if the circumstances warranted it.

Trial counsel had a duty to preserve Armstrong's right to a fair and impartial jury. Armstrong was prejudiced when a jury was empaneled that had not been thoroughly questioned regarding their backgrounds and any outside influences or biases. Additionally, several jurors expressed bias against Armstrong, and defense counsel failed to challenge them. No reasonably competent attorney would have failed to adequately question potential jurors and/or move to strike them from the jury when their responses showed bias. A new penalty phase with an unbiased jury is required.

ARGUMENT II

THE TRIAL COURT'S SUMMARY DENIAL OF THE MAJORITY OF ARMSTRONG'S CLAIMS DEPRIVED HIM OF DUE PROCESS AND ACCESS TO THE COURTS IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

The lower court summarily denied most of Armstrong's claims, allowing only a truncated hearing on several discrete issues. (PCR-2. 730-31.) After a case management conference on October 25, 2013, the court granted an evidentiary hearing on the following claims: part of Claim IV alleging ineffective assistance of counsel for failing to further inquire of Juror Gail Bacchus what she meant by the statement that she could vote for the death penalty because the defendant was "in a situation," part of Claim VII that alleges ineffective assistance of counsel for failing to call witness Kengeral (Kay) Allen who was at the crime scene and could have testified that Defendant was a minor participant, and Claim VIII alleging ineffective assistance of counsel based on actual conflict of interest.

This Court has indicated a preference for evidentiary hearings to be held on an initial postconviction motion. *Gaskin v. State*, 737 So. 2d 509, 516 (Fla. 1999) (Pariente, J., specially concurring) This Court promulgated Florida Rule of Criminal Procedure 3.851(f)(5)(A)(i), which requires that an evidentiary hearing be held on all initial postconviction motions where claims, as in the instant case, require a

factual determination. Although this is a resentencing, this is Armstrong's first postconviction motion arising from the resentencing proceeding. As the Court noted in *Gaskin*, [t]he rule was never intended to become a hindrance to obtaining a hearing or to permit the trial court to resolve disputed issues in a summary fashion." *Gaskin*, 737 So. 2d at 516.

The court denied a hearing on Claims I, II, III, IX, and X as they are purely legal claims that do not require a hearing. However, the court also denied a hearing on the remainder of Claim IV, Claim V, Claim VI, and the remainder of Claim VII because they were either legally insufficient, should have been brought on direct appeal, or positively refuted by the record. (PCR-2. 730.)

The remainder of Claim IV, which the lower court summarily denied, concerned misconduct and bias of four other jurors besides Juror Bacchus. In its order denying relief, the court made several assumptions and conclusions about Rowe's strategic reasons for not questioning these jurors. As it had with respect to Armstrong's unpresented mitigation evidence, the court here engaged in a post-hoc rationalization of Rowe's conduct during voir dire, turning virtual cartwheels to show that his utter failure to advocate for his client was reasonable, even going so far as to find that Juror McKay's lies about her criminal background were "consistent" and that there was no indication that asking her any other questions would have unveiled the truth about her background. (PCR-2. 1357-58.) Incredibly,

the court found that the record "refutes Defendant's conclusory allegations that trial counsel rendered ineffective assistance" during voir dire, even in the face of Rowe's total failure to ask a single pertinent question of any of these jurors. (PCR-2. 1358.)

None of these assumptions were supported by evidence, because Armstrong was not allowed to present any, nor was he allowed to ask him a single question about his voir dire strategy, except on a very limited basis with respect to Juror Bacchus. In fact, when counsel attempted to ask about his strategy, the court sustained a relevance objection by the State.

> PC COUNSEL: So generally, you didn't discuss with [potential jurors] how they should use mitigation evidence?
>
> PROSECUTOR: Judge, I'm going to object at this point. We're here for a specific point, one particular juror. This Court has already ruled on several other jurors and has denied those particular claims. So this needs to be structured to the one juror which this Court granted an evidentiary hearing on.
>
> PC COUNSEL: Judge, I'm just asking him about his strategy during jury selection. The Court granted us a hearing on this Gail Backhus juror, and I'm asking him a couple of questions regarding the strategy on his voir dire.
>
> COURT: Objection sustained.

(PCR-2. 1788-89.) It was utterly absurd for the court to only allow a hearing with

respect to one small subclaim which consisted of two sentences in the initial postconviction motion, and deny a hearing on the rest of the claim, which was far more substantial and in need of evidentiary development. The court here did exactly what this Court has warned against: by disallowing a hearing on the majority of Armstrong's juror claim, the court hindered Armstrong's ability to be heard and disposed of disputed issues in a summary fashion. *See Gaskin*, 737 So. 2d at 516.

In Claim V, Armstrong alleged that Rowe was ineffective for failing to investigate and present available mitigation, and that Armstrong's cognitive deficits and learning disabilities prevented him from giving a knowing, intelligent, and voluntary waiver of mitigation. (PCR-2. 233.) The lower court found that his waiver was valid because Armstrong testified (albeit incoherently) about his business acumen and real estate purchases in addition to his background in Jamaica. (PCR-2. 1377-78.) The court's finding was not based on any expert testimony, or indeed on anything other than Armstrong's testimony at his resentencing. This claim was not refuted by the record; in fact, just the opposite: it was supported by the testimony of the mental health experts who testified about Armstrong's frontal lobe damage, cognitive deficits, and learning disabilities during the 2001 evidentiary hearing. The court should have allowed Armstrong to present evidence to support his claim, instead of summarily denying it based on assumptions and speculation.

Claim VI alleged that Rowe was ineffective for failing to ensure that the trial

court considered all mitigating evidence 'contained anywhere in the record, to the extent it is believable and uncontroverted.'" *Muhammad v. State*, 82 So. 2d 343 (Fla. 2001). The trial court denied a hearing on that portion of the claim because it was procedurally barred and should have been raised on direct appeal. (PCR-2. 1382.) Armstrong has filed a habeas petition simultaneously with this brief alleging ineffective assistance of appellate counsel for failure to raise this claim on direct appeal.

Claim VI also alleged that counsel was ineffective for failing to ensure that the trial court considered all available mitigation evidence. This Court has held that "it is well-settled that mitigating evidence must be considered and weighed when contained anywhere in the record, to the extent it is believable and uncontroverted." *Robinson v. State*, 684 So. 2d 175, 177 (Fla. 1996). *See also Muhammad v. State*, 782 So. 2d at 363 ("It is clear from our previous cases that we expect and encourage trial courts to consider mitigating evidence, even when the defendant refuses to present mitigating evidence.") Although the defendants in *Robinson* and *Muhammad* presented no mitigation at all, the reasoning behind this Court's opinion still applies here: when death is on the line, and there is copious, compelling mitigation available in the record which could outweigh the aggravators, the court should consider it.

While Armstrong did present some mitigation, it was only a small fraction of what was available. When there is "substantial important" mitigation available, it is

incumbent upon the trial court to consider all of the evidence and speculate as to its potential effect on a jury, particularly when three more votes would have meant a life sentence. *See Armstrong II*, 862 So. 2d at 723. Not only did Rowe fail to ensure that the court considered all of the evidence including the mitigation presented at the 2001 evidentiary hearing, but he mocked the mental health mitigation ("I wouldn't bring in mental health experts who I don't believe is [sic] testifying relevantly to Mr. Armstrong's case" (RT. 1027); ("He [Mr. Armstrong] said he's not mad . . crazy. That the state attorneys and defense attorneys who are corroborating [sic] together to make him say he was mad." (RT. 1379.) Rowe had a duty to ensure that the trial court considered all available mitigation, and he failed to do so.

The trial court denied a hearing on this claim because Armstrong "did not waive mitigation altogether; he merely decided to limit the mitigating evidence presented during the penalty phase and the *Spencer* hearing." (PCR-2. 1382.) Thus, the court concluded that "trial counsel cannot be deemed ineffective for failing to follow the requirements of *Muhammad* that were not applicable to Defendant's case." (PCR-2. 1382.) However, the trial court should have allowed a hearing on this claim so that Armstrong could present evidence that Rowe was ineffective for failing to ensure that the court properly considered all available mitigation before sentencing him to death.

The court also allowed only a limited hearing with respect to Claim VII, which

alleged in part that counsel was ineffective for failing to present a viable defense. The substance of the entire claim was that Rowe's defense that Armstrong was a minor participant was objectively unreasonable, but since he decided to use that defense, Rowe should have called the one other person who was there who could have bolstered that defense: Kay Allen. However, because the court allowed only a truncated hearing and refused to allow postconviction counsel to question Rowe beyond the narrow scope of the issue of Allen, Armstrong was unconstitutionally prevented from fully developing evidence to support his entire claim. The lower court's refusal to allow Armstrong to present evidence to prove his claim was a deprivation of due process and access to the court. Because the court only allowed a hearing as to a portion of the claim, postconviction counsel was forced to develop evidence on only the second half of the claim, which made no sense.

Claim VII also alleged that counsel was ineffective for failing to attack the State's case because he did not object to the State's re-litigation of the guilt phase at Armstrong's resentencing. The State put on almost exactly the same case as it did at the guilt phase of Armstrong's trial in 1991. All but four of the witnesses who testified at the resentencing had testified at trial. Counsel should have sought to limit the testimony that the jury heard which was in excess of what was necessary to establish the aggravators. There was no reasonable strategic reason for this failure that was evident from the record, and therefore the court should have allowed a

hearing.

The trial court's denial of a full and fair evidentiary hearing deprived Armstrong of this due process rights and access to the courts, and Armstrong requests a remand to the circuit court for a full evidentiary hearing on his claims.

CONCLUSION

Based on the foregoing, Armstrong respectfully requests relief in the form of a new resentencing proceeding based upon the ineffective assistance of counsel. In the alternative, Armstrong requests a remand to the circuit court for a full and fair evidentiary hearing on his claims.

Respectfully submitted,

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CERTIFICATES OF SERVICE AND FONT

I HEREBY CERTIFY that a true copy of the foregoing has been provided to opposing counsel, Leslie T. Campbell, Assistant Attorney General, Office of the Attorney General, 1515 N. Flagler Drive, Suite 900, West Palm Beach, FL via electronic service at capapp@myfloridalegal.com this 24th day of April 2015.

Counsel further certifies that this brief is typed in Times New Roman 14-point font.

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