**IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA**

**STATE OF FLORIDA,**

Plaintiff,

**CASE NO.: 16-2013-CF-05781-AXXX**

**v.**

**DIVISION: CR-D
POSTCONVICTION CAPITAL CASE**

**DONALD JAMES SMITH, SR.,**

Defendant.
_____/

**RULE 3.851 MOTION FOR POSTCONVICTION RELIEF**

COMES NOW, Defendant, Donald James Smith., by and through undersigned counsel, and hereby moves this Honorable Court for postconviction relief pursuant to Fl. R. Crim. Pro. 3.851. In compliance with Rule 3.851, Defendant says further:

## A. PROCEDURAL HISTORY

On July 2, 2013, Donald James Smith was indicted by grand jury for the first-degree murder of [redacted] on or between June 21st and June 22nd of 2013, as well as kidnapping of a child under the age of 13 years and sexual battery on a child less than 12 years old. The State filed a notice to seek the death penalty on July 16, 2013. V1/R28 The State later noticed Mr. Smith of six aggravating factors[1]. V1/R1256

[1] These six aggravating factors are: 1) the defendant was previously convicted of a felony involving the use or threat of violence to a person; 2) the murder was committed while the defendant was engaged in the commission of a kidnapping and sexual battery; 3) the murder was committed for the purpose of avoiding or preventing a lawful arrest; 4) the murder was especially heinous, atrocious or cruel; 5) the murder was committed in a cold, calculated and premeditated manner without a pretense of moral or legal justification; and (6) [redacted] was less than 12 years of age. §§ 921.141(b), (d), (e), (h), (i), and (l)).

Counsel for the state and defense filed a number of pretrial motions, including an amended motion to change venue due to the relentless amount of media attention this case received (V1/R939-966), which was denied unless the parties were unsuccessful in their attempt to seat a fair and impartial jury. However, the defense accepted the panel. (V2/R973-976) An amended motion to suppress statements (V1/R1330-1337) was denied (V1/R1345-1351), and a motion to exclude gruesome or inflammatory photographs of the victim. (V1/R176-177), was denied after an evidentiary hearing (V1/R4050).

Defendant was tried between February 5-14, 2018. The jury returned a Guilty verdict on all counts. (V2/R1477-1479, 2889-2892) A penalty phase trial began on February 20, 2018, with the jury returning a unanimous recommendation of death (V1/2988-3012; V2/R2181-2195). The jury found the State had proved the existence of all six aggravating factors beyond a reasonable doubt. (V1/R2988-3012) The jury was presented with 3 statutory mitigators and 35 non-statutory mitigating factors to consider. The jury rejected all but two mitigating factors offered by Mr. Smith. They unanimously found his age at the time of the offense mitigating. (VI/R2990) Seven out of five jurors found it mitigating that he developed a close relationship with his son since he had been incarcerated. (VI/R3003) Mr. Smith elected not to present any evidence at the *Spencer*[2] hearing (V2/R2206), and the Court sentenced defendant to death on May 23, 2018 (V1/R3113-3145).

On direct appeal, Mr. Smith raised five issues, including: denial of the motion to change venue; denial of the motion for mistrial after the medical examiner became emotional during her testimony before the jury; denial of the motion to exclude autopsy photographs; overruled

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

objection to State's comments in Opening Statement; and fundamental error as to State's comments during Closing Argument. Mr. Smith raised the cumulative effect of all these errors, as well. On April 22, 2021, the Florida Supreme Court rejected all of the defendant's claims, and affirmed the judgment and sentence. *Smith v. State*, 320 So.3d 20 (Fla. 2021). A petition for writ of certiorari to the United States Supreme Court was denied on January 18, 2022. *Smith v. Florida*, 142 S.Ct. 870 (2022).

## B. STATEMENT OF CLAIMS

**CLAIM 1 - Counsel Was Ineffective for Failing to Identify, Interrogate and Strike a Biased Juror, Despite Having Been Alerted to the Prospective Juror's Bias in the Pre-Selection Questionnaire, in Violation of the Sixth, Thirteenth, and Fourteenth Amendments to the U.S. Constitution, as Well as the Corresponding Provisions in the Constitution of Florida.**

An evidentiary hearing is required for this claim:

### 1) Juror questionnaire

The juror questionnaire, which had been distributed to each of the prospective jurors and filled out by the prospective jurors the morning of the first day of jury selection, was given to trial counsel immediately prior to the voir dire questioning. See, PC Exhibit 1, Juror Questionnaire for Juror 13. Question Four of the questionnaire asked jurors "If your answers to Question One or Two were yes, have you formed an opinion as to the Defendant's guilt or innocence?" Questions One and Two asked whether the prospective juror had heard or read anything about the case, the Defendant, the victim, or the victim's mother. Prospective Juror 13 checked "yes" to Question One, indicating that she had heard or read about the case prior to coming to Court, and she also checked "yes" to Question Four, indicating that she had formed an opinion as to the Defendant's guilt. Question Five asked "If your answer to Question Four was yes, can you follow the instructions of this Court and put aside anything you have heard about this case and render a verdict

based only on the evidence and law presented during the trial?" Prospective Juror 13 initially checked the "no" box, then at some point later, crossed out the "no" and checked "yes", placing her initials next to that check mark. Given that she otherwise filled out the questionnaire correctly (although many other prospective jurors did not fill it out correctly, answering conditional questions even though their previous answers had not satisfied the conditions), it appears that Prospective Juror 13 initially did not believe that she could set aside her opinion of the Defendant's guilt or innocence. However, at some point, she changed her mind and indicated that she could set aside her pre-formed opinion, which was almost certainly guilty (given the extensive pre-trail publicity, all of which painted Defendant as the person who kidnapped, raped, and murdered the child victim).

**2) <u>Jury selection</u>**

It is impossible to know for certain from the questionnaire itself whether the changed answer was the result of a sincere change of heart, or whether Prospective Juror 13 realized (or had it pointed out to her) that the case was a high-profile one, with extensive media coverage, and that asserting that she could not set aside her pre-formed opinion of the Defendant's guilt would disqualify her from serving as a juror in the case. It was, therefore, incumbent on trial counsel to inquire as to the sincerity of, and source of, Prospective Juror 13's change of her answer to Question Five. However, when trial counsel Fletcher was given the opportunity to question Prospective Juror 13 about her answers on the questionnaire, he focused his questions entirely on her answer to Question One (related to her having heard or read something about the case), and was satisfied when Prospective Juror 13 indicated that she had only heard or read anything about the case at the time the crime occurred several years before, and had not heard any recent coverage about the case. V2/R171-172. He did not ask Prospective Juror 13 about her answers to Questions

Four and Five (on the next page of the questionnaire) and made no inquiry as to her pre-formed opinion of Defendant's guilt, and her changed answer to the question about her ability to set that opinion aside and render a verdict based solely on evidence presented in Court. The American Bar Association's guidelines for conducting jury trials specifies that "[w]here there is reason to believe that the prospective jurors have been previously exposed to information about the case, or for other reasons are likely to have preconceptions concerning it, counsel should be given liberal opportunity to question jurors individually about the existence and extent of their knowledge and preconceptions." ABA Standards for Criminal Justice: Discovery and Trial by Jury, Standard 15-2.4(d) (3d ed. 1996). The guidelines also provide for individual questioning outside the presence of other jurors "on sensitive matters or prior exposure to potentially prejudicial material." *Id.,* Standard 15-2.4(e).

Trial counsel never determined, either as part of the group questioning or individually, whether Prospective Juror 13 had sincerely changed her mind and was able to set aside her prejudice (as is required of an unbiased juror), or whether she had changed her answer because someone had advised her to, or because she wished to sit on the jury for the notorious case for her own reasons, despite holding actual bias against the Defendant. There was no strategic benefit to failing to inquire as to the extent of Prospective Juror 13's prior exposure to the case, and the circumstances of her changed answer as to her ability to set aside her pre-conceived opinion.

The only other questioning of Prospective Juror 13 during the entire process was performed by trial counsel Schlax, who questioned Prospective Juror 13 after attorney Fletcher and presumably knew that Prospective Juror 13's problematic answers to Questions Four and Five had not been challenged. Nevertheless, attorney Schlax only questioned Prospective Juror 13 about her ability to make difficult or life-changing decisions for herself, and whether she could understand that

other people may not make the same decisions for themselves, as part of her questioning of the entire panel.. V2/R924-925. Prospective Juror 13 was ultimately selected to sit as a juror, and she actually sat as one of the jurors who found Defendant guilty and sentenced him to death, as part of the unanimous jury votes in both the guilt and penalty phases.

The standard for ineffective assistance of counsel in jury selection is whether counsel allowed a juror with actual bias against the Defendant to sit on the jury. See *Singer v. State,* 109 So.2d 7 (Fla. 1959, at 19-21. A criminal defendant has a right to an impartial jury, and a prospective juror who lacks impartiality must be excused for cause. *Ross v. Oklahoma,* 487 U.S. 81, at 85; 108 S. Ct. 2273, at 2276; 101 L.Ed.2d 80 (1988). In the long-standing holding in *Andrews v. State,* 21 Fla. 598 (Fla. 1885), the Florida Supreme Court stated that "[w]hen the opinion formed is such that it will "take conclusive evidence to change his mind," we think that it has become too fixed to justify the person entertaining it to sit as a juror, even though it was not formed from hearing the witnesses and conversing with them. *Id.* at 603, citing *Proffatt on Jury Trial,* 186, 187.

It was incumbent on defense counsel to question Prospective Juror 13 about the basis and strength of her fixed opinion as to the Defendant's guilt, her actual willingness to set that opinion aside and consider her verdict solely on the basis of the evidence and testimony presented in the courtroom, and the reason or reasons for her changed answer on Question Five, as well as whether the changed answer was the result of any discussions with any other prospective jurors. There is no strategic reason for failing to question a prospective juror about their preconceived opinion about a case, and their ability to set that aside and judge a case only on the facts presented in court. Failure to do so created a suspicion that Prospective Juror 13 was actually biased against the Defendant, and courts must take care to remove biased prospective jurors if there is any reasonable doubt as to their impartiality. *Montozzi v. State,* 633 So. 2d 563, 19 FLW D607 (Fla 4th DCA 1994).

Trial counsel's failure to identify and question Prospective Juror 13 as a person with actual bias against Defendant was ineffective assistance of counsel, and prejudiced Defendant's right to a fair guilt phase of his trial, in violation of the Sixth, Thirteenth and Fourteenth Amendments to the U.S. Constitution, as well as the corresponding provisions of the constitution of Florida.

**CLAIM 2: Counsel Was Ineffective for Failing to Properly Question and Life Qualify Prospective Jurors Using the Colorado Method of Capital Jury Selection, and Failure to Make Sure that Prospective Jurors Were Properly Instructed Regarding Their Role in the Penalty Phase, in Violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, as Well as the Corresponding Provisions in the Florida Constitution.**

An evidentiary hearing is required for this claim:

The "Colorado method" of jury selection in capital cases was developed by Colorado defense attorney David Wymore in the 1970s, but became nationally known to the public in 2015, after Wymore and his associates won a life sentence for the defendant in the notorious 2013 movie theater shooting in Aurora, Colorado, which killed 12 people and injured 58. However, it had been used by, and taught to, capital defense attorneys for years before that, and has been credited (in part) with the sharp decline in death sentences over the past 20 years.

The use of "life qualification" as a means of selective pro-defense juries has been based on numerous federal decisions, including:

a. *Witherspoon v. Illinois,* 391 U.S. 510 (1968), which held that people with qualms about the death penalty may still be eligible to serve if they are able to set aside those reservations in a particular case and follow their oath;

b. *Wainwright v. Witt,* 469 U.S. 412 (1985), which allowed an absolutist pro-death prospective juror to be struck for cause; and

c. *Morgan v. Illinois,* 504 U.S. 719 (1992), which provides for exclusion for cause for refusal to even consider a particular mitigating fact which may arise in a particular case.

As noted in "Probing "Life Qualification" Through Expanded Voir Dire"[3], "[t]hus, taken together, these constitutional constraints mean that in order to be qualified to serve in a capital case, a prospective juror must be willing and able to: (1) require the State to prove all of the elements of murder and an aggravating factor beyond a reasonable doubt; (2) make an individualized decision in cases where both murder and an aggravating circumstance has been proven beyond a reasonable doubt as to whether death is the right punishment in that case, neither rejecting nor imposing it in every case; (3) give meaningful consideration to a wide range of mitigating factors; and (4) listen to and consider the thoughts of fellow jurors but stand her ground if convinced of a conclusion contrary to that of other jurors." *Id.* at 11.

The Colorado method provides a "highly specialized and technical procedure"[4] for identifying, educating, and insulating prospective jurors who can best perform those functions, and has the best chance of eliciting at least one vote for a sentence of life without the possibility of parole (hereinafter referred to as "LWOP").

1) **Methodology**

> (The following information was paraphrased from the article "Overview of the Colorado Method of Capital Voir Dire", written by Matthew Rubenstein, and published in the National Association of Criminal Defense Lawyers, Inc. magazine *The Champion*, November 2010 issue, pp. 18-27).

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[3] *Hofstra Law Review*, Vol. 29, Issue 4 (2001), written by John H. Blume, Sheri Lynn Johnson, and A. Brian Threlkeld.

[4] *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases,* February 2003 edition, page 102.

The basic methodology of the Colorado method is to focus not on the constitutionality of the state's death penalty apparatus (which has been litigated extensively post-*Furman*[5], and has survived numerous appellate challenges), but instead to focus on persuading jurors to impose an LWOP sentence rather than death. *Id.* at 18

The first portion of the method consists of identifying prospective jurors who may be sympathetic to LWOP, using a rating system to distinguish between those who would reliably vote for life no matter the circumstances, those who would not consider LWOP under any circumstances, and those who would fall somewhere in between. Given that Supreme Court cases would allow counsel to strike for cause those who would refuse to impose a death sentence under any circumstances (*Wainwright v. Witt*, 105 S.Ct 844), as well as those who would refuse to even consider anything but a death sentence upon conviction for first-degree murder (*Morgan v. Illinois*, 112 S.Ct. 2222), the focus of most of the examination of prospective jurors would be of those who fall between those two extremes. The method advocates use of a 1-7 rating system, with 1 being automatic life vote and 7 being an automatic death vote. The intent of dividing jurors is:

a. to identify automatic death penalty jurors so that they can be removed as quietly as possible, without "infecting" other prospective jurors;
b. to identify and attempt to insulate automatic LWOP jurors, to protect them from cause challenges by the state;
c. to try to educate pro-death jurors as to the need to respect the views of others, and recognize that different people may have different views from them based on different upbringings, life experiences, etc.;

[5] *Furman v. Georgia,* 408 U.S. 238 (1972)

d. To try to encourage pro-life jurors not to give in to browbeating or attempts at coercion by pro-death jurors, and bring a life recommendation out of the jury room; and

e. To rank the in-between jurors so as to most effectively use the defense's limited supply of peremptory challenges, and give the defendant the most life-leaning jury possible. *Id.*

The 1-7 ranking system is explained as follows:

a. Level 1- a person who will never vote for death in any circumstance and is vocal, adamant, and articulate about it. If this person cannot be swayed to consider at least some circumstance (no matter how unlikely) that they would consider imposing the death penalty, they will likely be removed for cause under the *Witt* precedent;

b. Level 2- a person who is hesitant to say that they believe in the death penalty, but can give meaningful consideration to the option. They recognize the seriousness of the obligation to sit on a capital jury, and great emphasis must be placed on educating them that the decision of life or death is each individual juror's alone, and that they must be willing to resist the influence of pro-death jurors and stand up for their beliefs;

c. Level 3- basically pro-death penalty, but unable to articulate reasons for their position. These people are often willing to vote for death so long as someone else is responsible for imposing the sentence (they are said to have a "kill problem"), and don't have strong reasons like deterrence or cost savings upon which to base their opinion. They may be more sensitive than other pro-death jurors to mitigation claims, and may be able to articulate reasons to vote against the death penalty if presented with compelling mitigation, and are more likely to respect the views of pro-life jurors than other pro-death jurors;

d. Level 4- comfortable and secure in the death penalty, can articulate their reason(s) for their feelings, and believe that the death penalty is a good thing for society. However, like Level

3 jurors, they are willing to listen to both sides, and may concede that there may be circumstances in which a life vote may be appropriate, even if guilt and aggravating circumstances are proven to them; the difference is their ability to express the rationale behind their comfort level with the death penalty;

e. Level 5- vocal, articulate pro-death juror; less sensitive to mitigation than Levels 3-4, but can perhaps envision two or three mitigating circumstances that they would consider significant. A Level 5 juror is a sure vote for death, unless the entire rest of the jury would vote for life, and is less likely to attempt to bully other jurors into voting for death than Level 6-7 jurors.

f. Level 6- strong death penalty juror; only thing that would protect them from a cause challenge under the *Morgan* precedent is their claim to "perhaps" listen to mitigation claims. Believes strongly that the death penalty deters crime and/or is more cost-effective than a life sentence without possibility of parole, and their only issue with the death penalty is that it isn't used often enough and quickly enough. Very likely to bully other jurors into going along with him, and must be questioned about his willingness to respect the opinions of those with differing views;

g. Level 7- will always vote for death under any circumstance, if given the opportunity. Believes strongly in "eye for an eye" arguments, and would only consider mitigation in circumstances where the defendant should be found not guilt by reason of insanity, or justifiable homicide (which, of course, means mitigation would be irrelevant). Removable for cause under *Morgan*, as he will not follow the law requiring him to consider all options. *Id.* at 18-19.

Practitioners must emphasize, from early in the jury selection process, the gravity of the life-or-death decision they may be asked to make, and the need for all to treat other jurors with respect and dignity. This helps encourage an atmosphere of candor and honest reflection on the part of respective jurors, who must be made to understand that in matters of a person's deepest feelings about a sensitive subject, there is no single "right" or "wrong" answer, and jurors must never be made to feel that they are being judged for their opinions, whether by the court, counsel, or their fellow prospective jurors. *Id.* at 20.

Prospective jurors should be made aware of the charges against the defendant, so that those who may have a close connection to the case or witnesses in the case may be identified. Additionally, some prospective jurors may be weeded out for hardship if the nature of the alleged offense would make it impossible for them to listen to and evaluate evidence due to their extreme emotional reaction to the testimony and evidence. However, care must be taken by defense counsel to avoid the perception in prospective jurors that, by thoroughly discussing the nature of the alleged offense and the possible penalties, defendant's counsel has already conceded the defendant's guilt. Prospective jurors must be made to understand that, because the parties will only be able to individually discuss both possible guilt and penalty matters before the guilt phase begins, defense counsel must discuss all possible outcomes of the case ("cart before the horse"), but should not be taken as a concession of guilt in any way. This must, however, be tailored to the strength of the state's case, so that defense counsel does not risk losing credibility in a case of overwhelming evidence of guilt. *Id.*

Defense counsel should request a pre-jury selection questionnaire to inquire about (aside from knowledge of the case, witnesses, and other routine questions) juror opinions on the death penalty, as well as an LWOP sentence. Counsel should request at least one week prior to start of

jury selection to review juror questionnaires (although this is often impossible, as they are often filled out by prospective jurors on the morning they report for jury duty). Jurors who state that they have already formed an opinion as to defendant's guilt and would not be moved by presentation of evidence, or other extreme and unlawful positions, may be challenged for cause before individual questioning begins. *Id.* at 21.

Prospective jurors, individually, should be given a hypothetical in which another defendant has been convicted of first degree murder, making it clear that it was premeditated, without justification, without self-defense, and without insanity issues. The prospective juror should then be asked whether the death penalty should be the only possible punishment in that case (this is called a "strip" question, as it is used to strip away automatic death penalty voters (Level 7). If the prospective juror indicates that they would consider LWOP, they should then be questioned about their feelings if the case against the hypothetical defendant had various aggravating circumstances (murder during the commission of another crime, multiple murders, victim is child/disabled/law enforcement, violent prior convictions, etc.) Include in the hypothetical aggravating factors that are expected to arise in the defendant's case, but also include others not likely to arise, so that defense counsel can't draw an objection for seeking a "pre-commitment" by prospective jurors in their own case. Counsel may also couch "case-specific" questions as "life-qualifying" by asking questions such as "If you found the hypothetical defendant guilty *of murdering children*, would you automatically vote to impose the death penalty, no matter what other facts may be presented?" By employing a number of different factual scenarios, the prospective juror's commitment to the death penalty (or lack thereof) can be ascertained. *Id.* at 21-22.

Questioning should transition from open-ended during the initial fact-gathering stage (while the defense team is determining how to rate individual jurors on the scale) to more leading

questions during the record-building stage. Use of leading questions should limit the variety of juror responses, and enable the practitioner to gather factual responses to challenge a "bad" juror (Levels 6-7) and contest a challenge to "good" jurors (Levels 1-2, possibly 3). *Id.* at 22-23.

Once ratings are established for the first 50-60 prospective jurors, the defense team should start to decide which jurors they want for the jury (to build a record to protect them from cause challenges) and which jurors they do not want (to build a record seeking to be able to challenge them for cause, to save a peremptory challenge). During questioning, it may be necessary to "re-strip" a strongly pro-death juror if they make statements about considering LWOP under certain circumstances (if those circumstances are not present in defendant's case). *Id.* at 22.

The goal is to establish that a juror has "case-specific penalty bias" (believes that death is the only appropriate sentence under circumstances similar to defendant's), can't give meaningful consideration to LWOP, has "case-relevant mitigating evidence bias" (will not give meaningful consideration to mitigating factors likely to arise in defendant's case), will "burden-shift" (automatically vote for death unless the defense presents sufficiently compelling evidence, instead of requiring the state to provide sufficiently compelling aggravation evidence to overcome what should be a bias toward LWOP), or base their decision on some improper basis (such as the cost of incarceration, etc.) *Id.*

Anti-death jurors may be "rehabilitated" by pointing out that a person may have strong moral, ethical, or religious reasons to oppose the death penalty, but may still serve on a capital jury if they can follow the law, which requires them to give meaningful consideration to all sentencing options. After an explanation of the two-phase trial setup (where jurors would never have to make a sentencing decision if the defendant is acquitted), jurors should be reminded that, unlike the guilt phase, penalty phase verdicts need not be unanimous, and a split verdict is perfectly lawful and

appropriate. Confirm that the juror can be fair, and can conform to the requirements of law, and explain that jurors are never required to find for death, and that an individual juror may find for LWOP even if their weighing of factors finds the greater weight on the aggravators side, or even if the juror finds no mitigators at all. Jurors should be reminded that any juror may bestow mercy on a defendant, and that mercy need not be something "earned" by a defendant, but is bestowed on them by a juror for any reason, or no reason- no juror must explain or justify a vote for LWOP to anyone, including their fellow jurors, the attorneys, or the Court. *Id.* at 23.

Finally, defense counsel should conduct a "principle confirmation" questioning, establishing three related concepts:

a. Isolation- jurors must be informed that the sentencing decision is an individual, personal moral judgment, based on that juror's personal ethical code, life experience, and common sense. Neither the Court nor the legal instructions will provide an "answer" for the members of the jury- each one must make the decision on their own, and no law ever requires a vote for death. Unlike the guilt phase, there is no such thing as a "hung jury" in the penalty phase;
b. Insulation- each juror must understand that their decision must be respected by the others, and must be committed to seeing that no juror will allow another to be coerced or intimidated into making a decision;
c. Respect- each prospective juror must commit to respecting the personal moral judgment made by each other juror- whether they agree with it or not. This individual decision must be respected, and no attempts at "conversion" should be tolerated by any juror. *Id.* at 23-24.

Jurors should also be instructed that, although there are a limited number of "statutory" aggravating factors which may be considered, mitigating factors may come from any source- either the so-called "statutory" mitigators, or any number of "non-statutory" mitigators (such classification should be avoided, to prevent jurors from placing undue emphasis on the "statutory" mitigators). *Id.* at 25-26.

Jurors should also be specifically instructed that there is no "mandatory" death penalty in certain types of cases, whether multiple murders, child murder, rape-murder, etc. A vote for LWOP is perfectly legal and acceptable regardless of the established facts of the case, and jurors should be instructed that they should never feel that they must vote for death in any case. *Id.* at 26-27.

**2) Counsel's Use of the Colorado Method**

Defense counsel helped prepare a pre-jury selection questionnaire, which contained the standard biographical information, a brief summary of the facts, and juror opinions about the death penalty (but not LWOP). The prospective jurors in the Smith case filled out their 4-page questionnaires on the morning that jury selection began. Counsel for Mr. Smith did not seek any additional time after receiving the executed questionnaires to review them, and confer among themselves and Mr. Smith. This rushed review may have been a factor in their failure to question prospective juror 13 about their answering no to the question about being able to put aside any advance knowledge of the case and rendering a verdict solely based on evidence presented at trial, then crossing out that answer and responding yes, as detailed in Claim 1 above.

After initial questioning about their responses to the questionnaire, counsels for the state and defense arrived at a pool of 80 prospective jurors out of the original pool of 300.

The prosecution, during their individual voir dire of the panel, used a 1-5 ranking system (with 1 being most resistant to a death sentence and 5 being most in favor of a death sentence) and

asked the prospective jurors to rank themselves. This was essentially a "death qualification" survey, as the prospective jurors who declared themselves 1s in the subgroup of jurors from which the jury was ultimately selected (jurors 16, 28, 37, and 57) were all struck by the state with peremptory challenges.

The defense, however, merely adopted these self-rankings, and never asked the jurors whether they would consider sentencing the defendant to LWOP. The defense was never able to structure the question because of state objections, and because they insisted on using the defendant's conviction and establishment of aggravators as an example (leading to an objection for asking jurors to "pre-commit"), and never used a hypothetical defendant, not the defendant, as an example. Trial counsel was ineffective for failing to structure questions that would elicit the desired information and avoid obvious objections.

As previously indicated, counsel for the defense, instead of using a hypothetical person as convicted murderer as a "strip" question, used the defendant while questioning prospective juror 13 (ROA V. 2 pg. 902). This drew a pre-commitment objection by the state, which was sustained, and defense counsel made no further attempt to ask a "strip" question of any of the other prospective jurors.

Defense counsel failed to question prospective jurors about their opinions on the death penalty regarding various other factual scenarios, instead limiting their questioning to matters that had been touched on in the questionnaire, such as whether jurors (or their relatives or friends) had previously been victims of crime, or whether the prospective jurors know any law enforcement officers. This type of questioning elicited no information as to prospective jurors' likelihood to vote for death upon conviction, nor did it educate the prospective jurors in any way.

As a result of their failure to establish any kind of effective means of ranking the prospective jurors as to their receptivity to a LWOP sentence, defense counsel had no means of targeting their informative questioning toward a potentially sympathetic audience. While they did briefly address the fact that a penalty phase jury verdict does not need to be unanimous and that any votes for LWOP means that the sentence would be LWOP (V2/922-924) and mentioned, in questioning two prospective jurors, the need to respect differing opinions (V2/924-928), the defense failed to individually question potentially life-giving jurors as to these vitally important concepts, and had no way of determining whether their questions truly reached a receptive audience.

The standard for determining whether counsel's assistance was so defective as to require reversal of a conviction or death sentence, as delineated in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984), consists of two parts: first, whether counsel's performance was deficient; and second, whether that deficient performance prejudiced the defense. *Id.* at 466 U.S. 687, 104 S.Ct. 2064.

The standard of "reasonable effectiveness" is less clearly defined, but requires (at a minimum) "reasonableness under prevailing professional norms". *Id.* at 466 U.S. 688. 104 S.Ct 2065. The Court recognizes, however, that "[b]ecause of the difficulties inherent in making the evaluation [regarding the reasonableness of counsel's performance], a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy". *Id.* at 466 U.S. 689, 104 S.Ct. 2065, citing *Michel v. Louisiana,* 350 U.S. 91, at 101, 76 S.Ct 158, at 164 (1955).

Given the facts that the Colorado Method was specifically designed for use in cases like Defendant's, where an overwhelming presumption of guilt existed, and that the method had a long "track record" of success in preventing death sentences in such cases, it was incumbent on counsel to use the method as a means of selecting jurors most likely to vote to sentence defendant to LWOP, rather than death. Failure to employ the Colorado method in that particular circumstance was *per se* unreasonable professional conduct, and the prejudice was the death sentence handed down by an improperly selected jury, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution, as well as the corresponding provisions of the constitution of Florida.

**CLAIM 3 – Defendant's Sixth Amendment Right to Trial Was Violated When Counsel Failed to Make Legal Objections and Abdicated Their Duty to Provide Competent Counsel by Allowing Defendant to Make Strategic Decisions Without Adequate Consultation In Violation of his Sixth, Eighth, and Fourteenth Amendments Rights Under the United States Constitution, and the Corresponding Versions of the Florida Constitution.**

An evidentiary hearing is required for this claim:

1) **Ineffective Assistance of Counsel for Failing to Make Legal Objections**

The United States Supreme Court has found in *McCoy*:

> The lawyer's province is trial management, but some decisions are reserved for the client — including whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forgo an appeal. Autonomy to decide that the objective of the defense is to assert innocence belongs in this reserved-for-the-client category. Refusing to plead guilty in the face of overwhelming evidence against her, rejecting the assistance of counsel, and insisting on maintaining her innocence at the guilt phase of a capital trial are not strategic choices; they are decisions about what the defendant's objectives in fact *are.* See *Weaver v. Massachusetts,* 582 U.S. ___, ___, 137 S.Ct. 1899, 1908, 198 L.Ed.2d 420.

*McCoy V. Louisiana*, 138 S. Ct. 1500, 1503 (2018). This law is at the heart of the issue in Defendant's case. It could be argued that the evidence against Defendant was overwhelming. Nevertheless, despite numerous discussions with the counsel, Defendant chose to maintain a plea

of not guilty and exercise his right to a full jury trial. Trial Counsel's notes reflect that Defendant's objectives were discussed concerning this decision. Notes dated October 2, 2017 during a client visit at the county jail state:

> Discussed strategy of pleading guilty vs. standing up in opening and admitting guilty as to her death.
>
> Pro of plea – reduce amount of evidence, gain credibility that he has accepted accountability.
>
> Pro of guilt state in full, at least theoretically increases chance of appellate error allows jury to find him guilty.

(PC Exhibit 2 – 10/2/17 Counsel Notes) Notes dated from a jail visit with Defendant on November 27, 2017 indicate, "Does not want to concede guilt in opening statement. Does not want to do anything to hurt in appellate error of guilt phase." (PC Exhibit 3 – 11/27/17 Counsel Notes) Again, on December 15, 2017 during a visitation with Defendant, counsel noted, "Discussed strategic advantage of just pleading guilty vs. having a trial." (PC Exhibit 4 – 12/15/17 Counsel Notes)

An attorney may reasonably assess that accepting guilt is a better strategy if pleading for mercy during the penalty phase of a first degree murder trial. However, the Court in *McCoy* recognized that the client may not share that objective. *McCoy* at 1503-4. While *McCoy* stands for the proposition that counsel may not enter a plea of guilty against his client's wishes, it also explains that only certain decisions are solely for the defendant to make while "trial management" is the "lawyer's province." *Id.* The following decisions are reserved for the client, "...whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forgo an appeal." *Id.* Therefore, if a client chooses to have a jury trial, decisions about whether to make legal objections, whether to cross examine a State witness and whether to present a closing argument are necessarily the duty of competent counsel. It would not save trial counsel from a finding of deficiency to complain that his client instructed counsel not to cross examine witnesses, object, offer closing

argument, etc. The licensed attorney is a professional with the education and experience who knows that those are necessary things in order to complete a record and preserve any issues for appeal on behalf of his client. If one's strategy for going to trial is to make sure the State meets their burden to prove the case against their client, it would be imperative to make objections where appropriate, require the State to lay proper foundations for the evidence presented and to have the main eyewitness testify in her own words – not just agree with the State's narrative.

**A) Failure to Object During State's Direct of** [redacted]

During the testimony of the most important eyewitness in Mr. Smith's case, [redacted] trial counsel made no legal objections. V2/R1027-1072 The State was allowed to lead this witness through every detail of the incident without a single objection from the Defense. While initially it may not seem to make a difference and helps to move the trial along to allow the State to lead concerning minor details, it becomes a pattern that lulls the Defense into not reacting when a detail could be meaningful. For instance, after [redacted] is asked to identify Mr. Smith in the courtroom, counsel allows the question, " "Ma'am, on June 21, 2013, the defendant didn't look like this did he?" V1/R1034 Rather than open ended questions, the State continues to ask questions that suggest the answer:

a. Do you recognize the person in that photograph? [Yes] Does this photograph fairly and accurately depict the way the defendant looked on June 21st when you first encountered him? V2/1034
   *v. Who is it a picture of? Have you seen this person before today? When? Did he look like the he does in that photograph?*

b. What did he say to you when you walked out the door of Dollar General? Did he make any other comments to you about [redacted] V1/R1036
   *v. Did he make any other comments to you?*

c. Do you recognize that photograph to be a photograph of the surveillance video from Dollar General on June 21st of 2013? V1/R1037

*v. Who is this a photograph of? The arrows pointing to defendant and [redacted] should have been added once she testified and identified that the people in the photograph were she and Mr. Smith.*

d. Do you recognize that to be a surveillance photograph on June 21st, 2013, that shows you, [redacted] and the defendant in the children's clothing section of Walmart? V2/R1053
*v. Similarly, requiring the witness to actually identify the photo and its contents, rather than agreeing with the State's testimony.*

e. Did he make mention of a gift card that he may have at Walmart? V1/R1038
*v. Did he say anything else?*

f. When [redacted] only testified that Mr. Smith had a $150 gift card and he was waiting on his wife, the State then prompted her with: Did he make you believe that he was going to give you or allow you to use that hundred dollar – or $150 gift card to buy items for [redacted] V1/1038
*v. Is that all he said about the card?*

g. After Mr. Smith asked [redacted] if she would like to see his driver's license, the State asked her: Did this sort of make you feel more comfortable? V1/R1042
*v. How did that make you feel?*

This type of leading goes on throughout [redacted] testimony. The State tells the witness what the exhibit is and asks if she agrees, then moves the photograph into evidence. V2/R1053 The State suggests why [redacted] trusted Mr. Smith and asks if she agrees. V2/R1057-8 The State paints exactly the picture they want to present to the jury with [redacted] only having to follow their lead. This issue has a high probability of impacting the penalty phase, as well as the guilty phase. One wonders why it was necessary for the State to testify for the eyewitness and lay out her narrative for her. With no objections, there was no possibility to uncover an appealable issue or force the State to prove their case. Counsel was ineffective for failing to follow the strategy discussed with Mr. Smith for going to trial, rather than entering a plea of guilty.

**B) Failure to Preserve a Ruling for Appeal Concerning the State's Presentation of Rope**

Another example is the fact that counsel filed a motion in limine concerning bringing up a bundle of rope that was never purchased and was left inside Walmart, due to it causing speculation about its intended purpose.[6] V1/R1452-3 The Court reserved ruling on the motion. V1/R4041 The State mentioned the rope in their opening statement without objection. They referred to the rope as "[a]n item that ultimately he didn't leave with, but one that foretold his intention." V2/1014 Neither was there an objection to the mention of the rope (State's Exhibit C) during the questioning of [redacted] to preserve this issue for appeal. V1/R1051 Counsel even let the State describe exactly what the photograph of the rope was rather than ask [redacted] to explain it to the jury. *Id.* When the State wants to move the exhibit into evidence as State's Exhibit 3, Counsel states for the record, "*No legal objection*, Your Honor." V2/R1052 After counsel allows the photograph into evidence, she belatedly mentions, "But, Your Honor, we would renew all prior motions." *Id.* The Court noted this for the record without ever having to rule on the motion. As the trial continued, the rope was once again an object of focus during the State's closing argument in both guilt and penalty phases, as well as the *Spencer* hearing:

> Only thing he picked up, the only thing that he placed in that shopping cart. Rope. We know the intent behind that because we've seen what happened afterwards. V2/R1425
>
> The deception, the bundle of rope. That is the evidence I submit that proves cold, calculated and premeditated. V2/R1518
>
> Even puts the rope in the grocery cart, foretelling what's in his mind, without regard for what anybody thinks about it. And then he commits the act. V2/R1527
>
> But he shows in his mind, through his actions, what's truly behind his eyes when he puts that rope in that shopping cart. V2/R2094

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[6] Trial counsel put the wrong location of the rope in their motion in limine. The motion states, "The bundle of rope was found in the defendant's van…" V1/R1453 And argued the wrong location during the motion. V1/R4038 The State had to correct him, "And to correct the record, I think Mr. Fletcher is just mistaken. The rope in question, which is depicted in State's [Exhibit B] is photographed at the check-out counter at Wal-Mart… he left the store before any purchases were made with [redacted]…" V1/R4039-40

The motion in limine challenged any presentation to the jury about this rope, which never left the store. Just as the motion argued they would, the State made "extremely prejudicial" assumptions about the rope that are unsupported by any statements of Mr. Smith or any other testimony. The motion argued that the prejudice outweighed any probative value. However, counsel never secured a ruling from the Court on this motion and their worst fears about the rope were realized with no right to appeal. Again, Mr. Smith was subjected to ineffective assistance of counsel.

**C) Failure to Object to the 911 Call**

In another example of counsels' failure to defend their client, they made no legal objection to the State playing [redacted] call to 911. V2/R1061 What [redacted] said was hearsay and used to bolster her testimony, which had not been impeached. No detail of her story had been challenged, not even through an objection. See, §90.801, Florida Statutes. The call consisted of a series of questions by the 911 operator which [redacted] answered. The information elicited during the call was mere duplication of the facts revealed during the State's questioning of [redacted] with its only purpose to emphasize her worry. It created a greater emotional impact on the jury to hear her voice at that time. V2/R1065 However, her concern and regret that she allowed [redacted] to go off with a strange man are not relevant to any element of the crime charged. See, §90.401, Florida Statutes.

Even if the State attempted to offer the 911 recording as an excited utterance, which is an exception to hearsay under §90.803(2), Florida Statues, an objection should have been made. The objection would have required a hearing outside the presence of the jury where the State would have to prove beyond a preponderance of the evidence that the statement was made before [redacted]

had time to contrive or misrepresent the facts that led up to the victim's disappearance.[7] Issues that the State sought to suppress in pretrial motions in limine may have been revealed. Furthermore, the call was made before [redacted] was aware of the murder and did not involve the murder at all. As no objection was made, there was no issue preserved for appeal.

Regardless of whether the 911 recording was ultimately viewed as an excited utterance, it still failed the balancing test for the admissibility of evidence. [redacted] testimony had not been impeached and the recording was cumulative to facts already elicited during direct examination of the eyewitness. The impact of [redacted] voice realizing [redacted] is missing was an emotional ploy whose prejudice far outweighed any probative value and should have been excluded. See, §90.403, Florida Statutes which states, "Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence." Therefore, the admissibility of this evidence is precluded by law. See, §90.402, Florida Statutes. Counsel was ineffective for failing to object to the playing of the 911 recording.

**D) Failure to Object to Digitally Altered Photographs**

Pre-trial, counsel filed a motion in limine objecting to digitally altered video. V1/R1421-2 The motion mentioned that color coded arrows were added to the videos to determine the locations of each person designated by the State. The Court denied the motion. V1/R4047 However, when the State moved photographs from the videos into evidence, trial counsel had no objection. V2/R1037, 1053 The arrows should have been added *after* the witness identified where they belonged. Since objections were not renewed at the time the State sought to enter the exhibits into evidence, no issue was preserved for appeal. Mr. Smith chose to have a trial so that he could

[7] *See, Tucker v. State*, 884 So.2d 168, 173 (Fla. 2d DCA 2004).

preserve issues for appeal, yet his attorney only went through the appearance of a trial with no actual substance. This is the epitome of ineffective assistance of counsel. The Defense even waived their closing argument. V2/R1437

If the State's case was not going to be challenged, then going to trial was the worst possible decision for a defendant facing the death penalty. The jury heard aggravating evidence twice, which made mounting a penalty phase argument for mitigation and mercy incredibly more difficult. Counsels' failure to defend their client at trial rises to the level of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland*, the Supreme Court stated, "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. *Id.* at 686. And further at 691-692, the Court found, "The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding."

In fact, counsels' ineffectiveness goes beyond *Strickland*, wherein part of the two prong test to determine whether a new trial is merited is whether counsel's ineffectiveness prejudiced the outcome of the case. This begs the questions of what happens when the evidence against a defendant is overwhelming. Would counsel then be entitled to just appear in court and sit at counsel table as not much more than a spectator while the State presents its case? At some point, the lack of defense becomes structural and results in the defendant being denied his Sixth Amendment right to a trial. In fact, the Court in *Strickland* alluded to this point when it stated, "In certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice." *Id.* Such is the situation in Mr. Smith's case.

2) **Inadequate *Faretta* Inquiry due to ineffectiveness of counsel to explain to defendant what issues were waived through this decision**

At one point, trial counsel abdicated their role as counsel and announced to the Court, "My client has just indicated to me that he does not wish for me to cross-examine [redacted] in any fashion. So I think it would probably be appropriate to have an inquiry." V2/R1073 The Court then had the following exchange with Mr. Smith, after putting him under oath:

> THE COURT: Earlier your attorneys had indicated that they may want to have some discussion with the Court and have some cross-examination of this witness, but your attorneys told me now that you wish for them not to do any cross-examination of this witness, is that correct?
>
> THE DEFENDANT: That's correct.
>
> THE COURT: Do you understand there will not be another opportunity for them to cross-examine her? Do you understand that?
>
> THE DEFENDANT: Blatant.
>
> THE COURT: And you understand, of course, as I told the jury, you're not –you and your attorneys, you're not required to do anything, they're not required to cross-examine any witnesses. Do you understand that?
>
> THE DEFENDANT: Yes, ma'am.
>
> THE COURT: And that is clearly how you wish to proceed?
>
> THE DEFENDANT: I don't want her to go through anything that she doesn't have to go through. I'm done.
>
> THE COURT: Okay. So you don't want any cross-examination?
>
> THE DEFENDANT: No, ma'am.
>
> THE COURT: And it's clear on the record your age. You're 61, is that correct?
>
> THE DEFENDANT: Yes, ma'am.
>
> THE COURT: We've gone over this before, you've got a work history, you've got an education history.
>
> THE DEFENDANT: Yes, ma'am.

THE COURT: You've understood everything that's going on in the courtroom before making this decision, is that correct?

THE DEFENDANT: Yes, ma'am.

THE COURT: All right. I do find that Mr. Smith has freely advised Court and counsel he wishes no cross-examination of this witness.

V2/R1073-5

The decision whether to cross-examine the main eyewitness should only be made by an attorney. Once the trial begins, it is in the court's discretion to even allow a defendant to belatedly exercise his right to represent himself. See, *Mosley v. State*, SC20-195 (Fla. Sept. 15, 2022), citing *United States v. Dunlap*, 577 F.2d 867 869 (4th Cir. 1978) ("[O]nce trial has begun, it is within the trial court's discretion whether to allow the defendant to dismiss counsel and proceed pro se."); *McCray v. State*, 71 So. 3d 848, 870 (Fla. 2011) ("As other courts have recognized, a trial court's decisions on a defendant's belated request for self-representation after the trial begins is reviewed for an abuse of discretion."); *Davis v. State*, 162 So. 3d 326, 327 (Fla. 3d DCA 2015); *Thomas v. State*, 958 So. 2d 995, 996 (Fla. 5th DCA 2007). This issue should be analyzed the same from either side of the question: Whether the court denied a defendant's request for self-representation, as well as whether it was appropriate to grant the defendant's belated request. Either way, it is up to the court to make a sound legal decision.

In Mr. Smith's case, his request right came after the State finished playing the very emotional 911 recording of [redacted] realizing [redacted] was missing after allowing [redacted] to go off with a strange man. Mr. Smith would have been in a vulnerable position at that moment and not in the frame of mind to make an intelligent, rational decision. He would not have needed to make that decision, because he was represented by counsel. The Court could have declined his request if Mr. Smith had been thoroughly questioned and the Court determined his

request was spontaneous and lacked careful consideration. The attorneys would have been allowed to proceed with their defense.

This situation is different than cases where counsel failed to ascertain and present available mitigating evidence for the penalty phase due to interference by the defendant. There are a number of cases that recognize that defendant's failure to provide names of mitigating witnesses or to insist that certain family members not be involved or shamed will not be imputed to trial counsel as a failure on their part. The Florida Supreme Court has relied on language from *Strickland* in finding that Covington[8] not wanting evidence of violence in his family introduced or Cherry[9] not providing mitigating witness information was not counsel's fault. *Strickland* at 691 was cited in both cases, "the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." It should be noted that the Court goes on to say in the sentences following this cite, "Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information… And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable. " *Id.* Had counsel not turned over their duty to try the case to Mr. Smith, they would not have needed any further information or assistance from Mr. Smith in order to proceed with cross examination. Relying on information and guidance from a client during penalty phase preparation and investigation is a very different situation than turning over an attorney's duty to lawyer in the middle of trial. In Mr. Smith's case, his strategic decision to go to

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[8] *Covington v. State*, SC21-295, SC21-1077, at *49 (Fla. Aug. 25, 2022).
[9] *Cherry v. State*, 781 So. 2d 1040, 1050 (Fla. 2000) (quoting *Strickland*, 466 U.S. at 691).

trial was discussed with counsel. It was understood that it was based on a desire to challenge the State's case and preserve issues for appeal. Waiving cross examination of the main eyewitness is detrimental to that strategy.

In Mr. Smith's case, counsel, perhaps understanding the inappropriateness of waiving cross examination of a key witness, decided to involve the court. In doing so, they signaled that they would not take responsibility for this decision, because it was not a decision that a client should make after emotional testimony in the middle of trial. Counsel asked the Court to "have an inquiry." V2/R1073 Apparently, counsel was referring to a *Faretta*[10] inquiry, which is the necessary questioning of a defendant who is giving up his right to be represented by counsel and proceed pro se. In *Faretta*, the Supreme Court stated:

> When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel. For this reason, in order to represent himself, the accused must "knowingly and intelligently" forgo those relinquished benefits. *Johnson* v. *Zerbst,* 304 U. S., at 464-465. Cf. *Von Moltke* v. *Gillies,* 332 U. S. 708, 723-724 (plurality opinion of Black, J.). Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that "he knows what he is doing and his choice is made with eyes open." *Adams* v. *United States ex rel. McCann,* 317 U. S., at 279.

The Court's colloquy with Mr. Smith fell below the requirements of *Faretta*. and Fla.R.CrimP. 3.111(d). Fla.R.CrimP. 3.111(d)(2), Waiver of Counsel states:

> A defendant shall not be considered to have waived the assistance of counsel until the entire process of offering counsel has been completed and a thorough inquiry has been made into both the accused's comprehension of that offer and the accused's capacity to make a knowing and intelligent waiver. Before determining whether the waiver is knowing and intelligent, the court shall advise the defendant of the disadvantages and dangers of self-representation. (Emphasis added).

[10] *Faretta v. California*, 422 U.S. 806 (1975).

The Court merely asks Mr. Smith if waiving cross examination is his wish. The Court notes his age as being sixty-one (61) and that he has "a work history" and "an education history." At no time does the Court advise Mr. Smith of the dangers and disadvantages of making this important decision. The Court does not ask him if he is being influenced by the 911 recording and will regret his decision when he has had a chance to think clearly again. The Court does not explain to Mr. Smith that he has counsel who is skilled and able to make a rational decision during the heat of trial. The Court merely asks him if he understand that [redacted] will not be questioned, which he does. The Court does not ask Mr. Smith if he understands how this decision may impact his case or an appeal.

While *Faretta* refers to a duty of the court to ensure Mr. Smith knowingly and intelligently waived his right to counsel, the court cannot satisfy its duty where trial counsel has failed to make sure their client understands what they were going to ask the witness on cross-examination and what issues for appeal would not be challenged if there was no cross-examination. On November 25, 2014, the State filed State's First Motion In Limine seeking to exclude any evidence pertaining to the personal history or character of [redacted] V1/R752 In the Court's Order on State's First Motion In Limine, the Court excluded some evidence that was revealed about [redacted] in her deposition and also ruled that some evidence sought to be excluded would be proffered at trial:

- [redacted] has gone by other names; [Excluded]
- [redacted] twice; [Excluded]
- [redacted] [Excluded]

- [redacted] has been diagnosed with mental health disorders, including bipolar disorder and borderline personality disorder. She had been committed to the hospital six (6) times; [Shall be proffered at trial]
- She has given false statements under oath; [Shall be proffered at trial]
- [redacted] is clairvoyant. [Shall be proffered at trial]

The Court would rule on the admissibility of evidence to be proffered at the time of trial. V1/R830-832 [See also, PC Exhibit 5, Deposition of [redacted]. In fact, the Court had dismissed the jury after [redacted] direct examination and given them a break so that the parties could argue the issues from the motion in limine left to be decided at trial. V2/R996-7, 1072 The jury was already on break. This was the perfect opportunity for counsel to request some time to discuss the decision not to cross-examine [redacted] before the Court began its *Faretta* inquiry. Unfortunately, since [redacted] was not cross-examined, no issue about the admissibility of the foregoing evidence can be reviewed on appeal.

Where trial counsel is being asked to disregard their own ethical duty to competently represent their client, the defendant must be made to fully understand the consequences. It is not enough to just ask, Do you understand she will not be cross examined? It is the understanding of the *consequences* of not cross examining an eyewitness that must be ascertained. In a death penalty case, [redacted] testimony had ramifications for the guilt phase and the penalty phase, as well. Competent counsel would have advised their client what he was actually giving up when he made an emotional plea to disregard his own trial and take pity on [redacted]. Competent counsel would have asked the Court for time to speak to their client confidentially about this decision before he was questioned by the Court according to *Faretta*. There was no time between the Court dismissing the jury to take a short break after direct examination of [redacted] and

counsel's request for the Court to question Mr. Smith, who "just indicated to [them]" he did not want her to be cross-examined. V2/R1072-3

The Supreme Court stated in *Strickland*, "The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair." *See Strickland,* at 685. Unfortunately, it appears that counsel was eager to take a pass on a difficult part of their job, the cross-examination of the child's mother. However, not making a record that shows Mr. Smith fully understood the consequences of making pro se decisions that are reserved for licensed attorneys is not just an issue for appeal concerning the adequacy of the Court's *Faretta* inquiry. It also goes to the ineffective assistance of counsel where counsel too quickly and inadequately shirked their duty to fully represent Mr. Smith's interests. As the Supreme Court explained, the Sixth Amendment requires counsel to "fulfill the role in the adversary process that the Amendment envisions." *See Strickland*, at 688. As trial counsel has failed to fulfill this role, Mr. Smith's Sixth Amendment right to trial was substantially prejudiced and he should be granted a new trial.

**CLAIM 4 – Mr. Smith's Trial Was Fraught with Procedural and Substantive Errors Which Cannot Be Harmless When Viewed As a Whole, Since the Combination of Errors Deprived Him of a Fundamentally Fair Trial Guaranteed Under the Constitution In Violation of his Fifth, Sixth, Eighth, and Fourteenth Amendments Rights Under the United States Constitution, and the Corresponding Versions of the Florida Constitution.**

An evidentiary hearing is required for this claim:

All other allegations, factual matters, legal arguments and legal authority contained elsewhere in this motion are fully incorporated herein into each of the following claims.

Mr. Smith contends that he did not receive the fundamentally fair trial to which he was entitled under the Eighth and Fourteenth Amendments. *See*, *Heath v. Jones*, 941 F.2d 1126 (11th Cir. 1991); *Derden v. McNeel*, 938 F.2d 605 (5th Cir. 1991). It is Mr. Smith's contention that the process itself failed him. It failed because the sheer number and types of errors involved in his trial at both the guilt and penalty phases, when considered as a whole, virtually dictated the sentence that he would receive. *State v. Gunsby*, 670 So. 2d 920 (Fla. 1996).

The flaws in the system which sentenced Mr. Smith to death are many. They have been pointed out throughout not only this pleading, but also in Mr. Smith's direct appeal; and while there are means for addressing each individual error, the fact remains that addressing these errors on an individual basis may not afford adequate safeguards against an improperly imposed conviction and death sentence -- safeguards which are required by the Constitution. These errors cannot be harmless. The results of the trial and sentencing are not reliable. Rule 3.851 relief must issue.

## LEGAL ARGUMENT

Reasonable attorney performance obliges counsel "to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Strickland v. Washington*, 466 U.S. 668, 685 (1984). "One of the primary duties defense counsel owes to his client is the duty to prepare himself adequately prior to trial." *Magill v. Dugger*, 824 F.2d 879, 886 (11th Cir. 1987); "pretrial preparation, principally because it provides a basis upon which most of the Defense case must rest, is, perhaps, the most critical stage of a lawyer's preparation." *House v. Balkom*, 725 F.2d 608, 618 (11th Cir.), *cert.denied*, 469 U.S. 870 (1984); *Weidner v. Wainwright*, 708 F.2d 614, 616 (11th Cir. 1983). As stated in *Strickland*, an attorney has a duty to undertake reasonable investigation or "to make a reasonable decision that makes particular investigations

unnecessary." 466 U.S. at 691. No tactical motive can be ascribed to an attorney whose omissions are based on ignorance *Brewer v. Aiken*, 935 F.2d 850 (7th Cir. 1991), or on the failure to properly investigate or prepare. This motion demonstrates, as the Florida Supreme Court stated in *State v. Fitzpatrick*, 118 So.3d 737, 753 (Fla. 2013), "[although] 'the duty to investigate does not force defense lawyers to scour the globe on the off chance something will turn up,' *Rompilla v. Beard*, 545, U.S. 374, 383 (2005), postconviction evidence demonstrates that counsel's preparation and performance were constitutionally inadequate, and his decisions before and during trial were not tactical or reflective of a reasonable trial strategy."

Even if counsel provides effective assistance at trial in some areas, the defendant is entitled to relief if counsel renders ineffective assistance in his or her performance in other portions of the trial. *Washington v. Watkins*, 655 F.2d 1346, 1355, *rehearing denied with opinion*, 662 F.2d 1116 (5th Cir. 1981), *cert.denied*, 456 U.S. 949 (1982). *See also, Kimmelman v. Morrison*, 106 S.Ct. 2574 (1986). Even a single error by counsel may be sufficient to warrant relief. *Nelson v. Estelle*, 642 F.2d 903, 906 (5th Cir. 1981) (counsel may be held to be ineffective due to single error where the basis of the error is of constitutional dimension), *Nero v. Blackburn*, 597 F.2d 991, 994 (5th Cor. 1979) ("sometimes a single error is so substantial that it alone causes the attorney's assistance to fall below the Sixth Amendment standard").

In *Strickland v. Washington*, 466 U.S. 668 (1994), the United States Supreme Court held that counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial process." *Strickland* requires a defendant to plead and demonstrate (1) unreasonable attorney performance, and (2) prejudice. In this motion, Mr. Smith has demonstrated substandard representation by trial counsel in each claim. Each claim establishes Mr. Smith's right to a new trial, as the omitted evidence and missed

objections call into question the reliability of jury's verdict. Considered together, the argument is even more compelling. Mr. Smith's conviction for first degree murder and sentence of death is the resulting prejudice.

**CLAIM 5 – Mr. Smiths' Constitutional Rights Were Violated When Counsel Deficiently Listed and Called Dr. Holmes as a Witness During His Penalty Phase Trial, Resulting In Prejudice In Violation of his Sixth, Eighth, and Fourteenth Amendment Rights Under the United State Constitution, and the Corresponding Provisions of the Florida Constitution.**

An evidentiary hearing is required for this claim:

1) **Ineffective Assistance of Counsel under the Sixth Amendment**

Trial counsel provided constitutionally ineffective assistance during Mr. Smith's penalty phase by listing and calling Dr. Holmes as a defense witness. Counsel's unreasonable decisions ultimately allowed her damaging deposition testimony to be heard by penalty phase jurors and sufficiently undermines his sentence of death to warrant penalty phase relief under *Strickland*. *See Sliney*, 944 So.2d 270, 285 (Fla. 2006); *see also Strickland,* 466 U.S. at 686-688.

Ineffective assistance of counsel during the penalty phase is reviewed under the two-prong test established by *Strickland*. *Id.*, at 668; (*see also Simmons v. State*, 105 So. 3d 475, 503 (Fla. 2012). This requires a showing that trial counsel's performance was both deficient and prejudicial to establish "that [counsel]'s deficient performance deprived [the defendant] of a reliable penalty phase proceeding." *Hoskins v. State*, 75 So. 3d 250, 254 (Fla. 2011); *see also Strickland*, 466 U.S. at 687. Deficient performance is established when counsel's acts were unreasonable, which turns on prevailing professional norms and whether the preparation and investigation used to support counsel's decisions was sufficient to support an informed and knowledgeable decision. *See Wiggins v. Smith*, 539 U.S. 510, 523 (2003). To assess reasonableness, this court "must consider

not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further," or proceed differently. *Wiggins*, 539 U.S. at 527. When examining counsel's performance, an objective standard of reasonableness applies. *See Strickland*, 466 U.S. at 689. No tactical motive can be ascribed to an attorney whose actions are based on ignorance or on the failure to thoroughly investigate or prepare. *Brewer v. Aiken*, 935 F.2d 850 (7th Cir. 1991). Counsel has a duty to "find witnesses to help humanize the defendant," among other potential mitigation evidence, and to be fully informed of the available mitigation for penalty phase purposes. *Hardwick v. Crosby*, 320 F. 3d 1127, 1163 (11th Cir. 2003). Counsel must have sound reasons for omitting available mitigation evidence from the penalty phase and it must have been harmful in some respect to the defendant's case. *See Simmons* v. State, 105 So.3d 475, 497 (Fla. 2012); *see also Sliney v. State*, 944 So.2d 270, 285 (Fla. 2006); *see also Rutherford v. State*, 727 So.2dd 216, 223 (Fla. 1998); *see also State v. Lewis*, 838 So. 2d 1102, 1113 (Fla. 2002) ("[T]he obligation to investigate and prepare for the penalty portion of a capital case cannot be overstated—this is an integral part of a capital case.").

Counsel's deficient performance must also prejudice the defendant. *See Strickland*, 466 U.S. at 687. Prejudice in the penalty phase context asks, "whether the error of trial counsel undermines this Court's confidence in the sentence of death when viewed in the context of the penalty phase evidence and mitigators and aggravators found by the trial court." *Bevel v. State*, 221 So.3d 1158, 1179 (Fla. 2017) (citing *Hurst v. State*, 18 So.3d 975, 1013 (Fla. 2009)); *see also Porter v. McCollum*, 558 U.S. 30, 41 (2009) ("Under this standard, a defendant is not required 'to show that counsel's deficient conduct more likely than not altered the outcome of his penalty proceeding, but rather that he established 'a probability sufficient to undermine confidence in [that] outcome.") Post-*Hurst*, a reasonable probability sufficient to undermine confidence in the death

sentence is one that considers "whether the unpresented mitigation evidence would have [an effect on] as little as *one juror* to vote for life." *See Bevel*, 221 So. 3d at 1181, 1183 (emphasis added). In this case, the issue is the ineffectiveness of presenting obviously harmful evidence. However, the point of *Bevel* is the same. Had this negative evidence not been presented, would it have tipped the scales in Mr. Smith's favor and affected at least one juror to vote for life?

### A) Trial Counsel's Decision to List and Call Dr. Holmes as a Witness During Mr. Smith's Penalty Phase was Deficient Performance.

Trial counsel provided constitutionally ineffective assistance during Mr. Smith's penalty phase by calling Dr. Holmes as a defense witness and subjecting her to cross-examination by the state, which allowed her extremely damaging testimony to be heard by penalty phase jurors, and prejudiced Mr. Smith by resulting in his sentence of death, warranting relief under *Strickland v. Washington*, 466 U.S. 668, 686-688 (1994). The statements and opinions Dr. Holmes provided during her deposition, and in her written expert opinion, gave counsel more-than-adequate notice that her testimony would provide no probative mitigation evidence on Mr. Smith's behalf and posed significant harm to the efficacy of his remaining mitigation presentation. (PC Exhibit 6 - Dr. Holmes Deposition); (PC Exhibit 8 - Dr. Holmes Report). Ultimately, and without reason, counsel failed in their Sixth Amendment duty to avoid the significant harm posed by the testimony of Dr. Holmes and called her to the stand as Mr. Smith's *first* penalty phase witness. V2/R1566. Dr. Holmes did not vacillate from her deposition testimony and as result of trial counsel's deficient decision to present her as a penalty phase witness, jurors heard an avalanche of otherwise unavailable aggravation evidence without eliciting any otherwise unavailable mitigation evidence. *See Strickland*, 466 U.S. at 668. This included her inflammatory, and seemingly biased, description of Mr. Smith as "the most dangerous pedophile she had ever met," alongside her extremely damning conclusion that Mr. Smith had *no available mitigation* available to present on his behalf.

V2/R1598, V2/R1601, V2/R1609.

While the Florida Supreme Court (hereinafter "FSC") has made clear that "[s]trategic decisions do not constitute ineffective assistance of counsel[,]" no deference should be afforded to Mr. Smith's trial counsel because their actions were objectively unreasonable. *Occhicone v. State*, 768 So.2d 1037, 1048 (Fla. 2000). The listing and calling of Dr. Holmes during Mr. Smith's penalty phase cannot be considered 'sound trial strategy' because counsel's performance was objectively unreasonable. *See Miller v. State*, 161 So.3d 354 (Fla. 2015); *see also Bradley v. State*, 33 So.3d 664, 671-62 (Fla. 2010) ("The defendant bears the burden to 'overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'")

In *Miller v. State*, the FSC found trial counsel deficient for failing to recognize that their hired expert's testimony was not favorable to their client before listing him as a witness. *See Miller*, 161 So. 3d at 366-67. The FSC reasoned counsel was deficient because "[trial counsel] did not appreciate or even realize the negative implications of [their expert]'s proposed testimony until the State deposed him." *Id.*, at 367. Further, the FSC explained that "[trial counsel] should have recognized and understood the implications of Dr. Danziger's testimony and the consequences of listing a confidential expert as a witness." *Id.* The FSC concluded that this conduct constituted deficient performance because "[c]ounsel's failure to fully assess the negative implications of Dr. Danziger's testimony before listing him as a witness was objectively unreasonable and cannot be considered a reasonable trial strategy." *Id.*

Trial counsel should have never listed Dr. Holmes as an expert witness. The statements and opinions Dr. Holmes made in her written expert opinion, and later expounded upon in detail during her deposition, provided notice to counsel that her proposed testimony would offer no probative mitigation evidence on Mr. Smith's behalf. By listing Dr. Holmes as an expert witness,

the State had the right to take her deposition and obtain otherwise privileged information. *See Miller*, 161 So. 3d at 366-67. From the initial receipt of her report, counsel was deficient for failing to investigate and discern the harmfulness of Dr. Holmes's opinion and prospective testimony before listing her as a witness. *Id.* After the deposition counsel should have struck Dr. Holmes from the witness list and should never have called her to testify at trial. Her deposition testimony was sufficient to place even the most minimally competent counsel on notice that Dr. Holmes testimony was exceptionally harmful to Mr. Smith's case in mitigation and its only effect would be to enrage the jury into voting for death. Once listed, Dr. Holmes gave far more damaging testimony than what trial counsel already knew from her report. (PC Exhibit 8, Dr. Holmes Report); *see also Miller*, 161 So. 3d at 366.

The FSC holding in *Miller* makes clear that Mr. Smith's trial counsel was objectively unreasonable for listing Dr. Holmes as a witness. Counsel's deficient performance began long before the calamitous decision to present her testimony before penalty phase jurors. *See Id.*; *see also Occhicone*, 768 So.2d at 1048. From the beginning, trial counsel was on notice that Dr. Holmes would not be able to provide the testimony that the defense team hoped. As early as her first of three meetings, counsel should have known that any testimony from Dr. Holmes would be vulnerable to attack because she did not perform any testing during her series of evaluations. (PC Exhibit 6, Dr. Butler Penalty Phase Report, p. 9); *see also Miller*, 161 So.3d at 365-366. In addition, it should have been clear to competent counsel upon receipt of this initial report by Dr. Holmes on December 6, 2017, that she would not be a favorable expert witness for Mr. Smith and should not remain listed as a potential penalty phase witness. Her report also contained the statement that Mr. Smith admitted to Dr. Holmes "[redacted]" Mr. Smith also

admitted to Dr. Holmes that "[redacted]" Dr. Holmes concluded her report with a diagnosis of [redacted] (amongst others) and noted that "[redacted]" (PC Exhibit 6, Dr. Butler Penalty Phase Report, p. 9-10). These observations from Dr. Holmes's report went directly against the main goal of Mr. Smith's penalty phase, which was to show he sought help and attempted to protect society against himself shortly before the offense.[11] (PC Exhibit 8, Dr. Holmes Report). However, without reason, counsel listed Dr. Holmes as a penalty phase witness, who was thereby deposed by the state on January 16, 2018. (PC Exhibit 7, Dr. Holmes Deposition). Thus, like in *Miller*, counsel was deficient for listing Dr. Holmes as a witness because her report and conduct gave clear notice to trial counsel that Dr. Holmes' testimony would be "more favorable to the State than to the defense." *Id.*

However, in addition to counsel's error in *Miller*, Mr. Smith's trial counsel goes a step further in their deficient conduct and unreasonably decides to not only list, but present, Dr. Holmes as a penalty phase witness. This decision to call Dr. Holmes to the stand following her catastrophic deposition testimony unreasonably surpasses what the FSC already found constituted deficient performance. *See Miller*, 367. [12] *Miller's* trial counsel was at least aware that they should not

[11] In her most recent report, Dr. Butler explained the defense team's goal to show Mr. Smith was a deeply troubled man whose mental illness had escalated beyond his control. (PC Exhibit 6, Dr. Butler Penalty Phase Report, p. 3-4). Dr. Butler also stated that a big portion of the defense strategy was to show jurors Mr. Smith had attempted to confine himself two weeks before the incident. (PC Exhibit 6, Dr. Butler Penalty Phase Report, p. 8).

[12] The *Miller* court noted that upon retaining their expert, "[counsel] carefully limited the information provided to Dr. Danziger and intentionally did not provide him with specific details

present Dr. Danzinger after his deposition because it would "give the State ammunition to do a very effective cross-examination." Mr. Smith's counsel wholly ignored this identical danger and ineffectively proceeded with the presentation of Dr. Holmes.

Counsel's action of calling Dr. Holmes becomes even more incomprehensible once her deposition testimony is considered. Dr. Holmes's deposition testimony was far more problematic and damaging than the opinions already contained in her report and should have clearly precluded her testimony from the defense penalty phase presentation had counsel acted reasonably. Following the deposition of Dr. Holmes, trial counsel had full knowledge of the following inflammatory and damaging statements she made about Mr. Smith during her deposition that would likely be elicited by the state during her cross examination:

- [redacted]
- [redacted]
- [redacted]
- [redacted] (PC Exhibit

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of Miller's homicide conviction in Oregon[,]" to mitigate against unnecessary harm. *Id.*, at 366. Even still, the *Miller* defense expert, Dr. Danzinger, opined that "[redacted]" In response, Miller's counsel sent a written correspondence to Dr. Danziger and explained in writing that "[redacted] *See Id.* (citing *Morton v. State*, 789 So.3d 324, 329-30 (Fla. 2001) (("concluding that '[b]oth the United States Supreme Court and this Court have determined that a defendant's antisocial personality disorder is a valid mitigating circumstances for trial courts to consider and weigh.'")) However, even in light of this opinion and the potential for this information to be revealed throughout the course of their representation, Dr. Danzinger was still listed as a witness and deposed by the state. *See Id.*, at 365-366. Similarly, after receiving her opinion, Mr. Smith's counsel proceeded to list Dr. Holmes as a witness pursuant to Florida Rule of Criminal Procedure 3.220(d)(1)(A).

7, Dr. Holmes Deposition, p. 18).

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Based on these statements, it should have been clear to defense counsel that Dr. Holmes would not provide any probative mitigation evidence on Mr. Smith's behalf. There was no reasonable possibility that the defense could limit jurors' exposure to this aggravation evidence during the cross examination of Dr. Holmes. Instead, counsel unreasonably chose to present this otherwise inadmissible evidence through Dr. Holmes, where, in addition to this supposed "mitigation," jurors would also undoubtedly hear her personal commentary from her deposition testimony regarding how exquisitely dangerous he was without any redeeming characteristic during the state's cross-examination. (PC Exhibit 7, Dr. Holmes Deposition, p. 21-23, 54).

Dr. Butler immediately reached out to trial counsel after reading Dr. Holmes' deposition to "discuss the damaging nature of her testimony." (PC Exhibit 6, Dr. Butler Penalty Phase Report, p. 12). Trial Counsel indicated that "she had spoken to Dr. Holmes [who] had [paraphrased] 'said some things to make her feel better." Dr. Butler asked trial counsel what Dr. Holmes had said to them about her deposition testimony to assuage their concerns because she did not believe it would be possible that Dr. Holmes could provide favorable mitigation testimony given her prior statements. (PC Exhibit 6, Dr. Butler Penalty Phase Report, p. 11) In response to Dr. Butler's concern about presenting her as a witness during the penalty phase, trial counsel implied that "Dr. Holmes planned on qualifying her testimony in a way that would be more favorable to the defense." (PC Exhibit 6, Dr. Butler Penalty Phase Report, p. 11) Dr. Butler "expressed confusion" about the viability of that plan and "indicated our defense team should refrain from having her testify in front of the jury." However, Dr. Butler could not make the final determination about this decision and ultimately, trial counsel ignored this advice and made the unreasonable, deficient, decision to open the defense penalty phase mitigation presentation by tendering Dr. Holmes as an expert witness.

After the deposition, counsel should have struck Dr. Holmes from the witness list. No reason existed to support counsel's deficient decisions to list and call Dr. Holmes as a witness following her deposition. There was also no strategy in risking the presentation of very damning statements blaming the victim for his crime or Dr. Holmes's inappropriate and inflammatory observation that Mr. Smith was one of the most dangerous sex offenders that she had ever met. (PC Exhibit 7, Dr. Holmes Deposition, p. 21-23, 54). No reason exists within the context of Mr. Smith's penalty phase mitigation presentation to support any 'strategic' decision by trial counsel in light of the substantial likelihood that the state would undoubtedly elicit her most egregious

observations and conclusions in front of Mr. Smith's penalty phase jury. *See e.g.*, *Miller*, 161 So. 3d at 366-67; *see also Wiggins*, 539 U.S. at 524. Dr. Holmes was clear in her deposition that she did not believe any of the mitigation factors she was retained to evaluate for Mr. Smith were applicable to him or his life history. *See Williams*, 529 U.S. at 396. Her testimony was wholly unnecessary in light of the other available mitigation evidence ultimately presented on Mr. Smith's behalf. There is no strategic reason, or any probative evidence, that trial counsel needed to elicit from Dr. Holmes that would have justified the risk of jurors hearing contradictory and hostile testimony from a defense doctor that did not support their theory of mitigation.

Mr. Smith's counsel had several other experts hired and presented on his behalf during his penalty phase. The presentation of Dr. Holmes did nothing more than discredit the mitigation Dr. Buffington, Dr. Colino, Dr. Wu and Dr. Butler did present on Mr. Smith's behalf. Dr. Holmes made several remarks during her deposition that directly contradicted the other available mitigation evidence trial counsel had available to present on Mr. Smith's behalf. Of particular importance, Dr. Holmes stated that she saw no indication of brain damage, even though Mr. Smith had been evaluated by a neurologist, Dr. Colino, and a neuropsychologist, Dr. Sesta, who found that he did in fact suffer from a organic brain dysfunction. (PC Exhibit 7, Dr. Holmes Deposition, p. 42-43); (PC Exhibit 9, Dr. Colino Trial Report); (PC Exhibit 10, Dr. Sesta Trial Report); (PC Exhibit 11, Dr. Buffington Trial Report); (PC Exhibit 12, Dr. Wu Trial Report.) Dr. Holmes's conclusion that she failed to observe any behavior that indicated Mr. Smith suffered from any neurocognitive disorder was especially problematic because Dr. Holmes did not conduct any testing during her evaluations. As Dr. Butler explained, neurocognitive "[redacted]

[redacted]" (PC Exhibit 6, Dr. Butler Penalty Phase Report).

Further, Dr. Holmes's testimony "eliminated or minimized the mitigating factors listed in Florida Statute 921.141 as examples of reasons jurors can cite to vote for a sentence of life imprisonment." (PC Exhibit 6, Dr. Butler Penalty Phase Report). Dr. Holmes failed to identify *any* of the probative mitigating aspects of the diagnoses or observations she had of Mr. Smith, his past, or his available statutory mitigators. Instead, her deposition testimony focused solely on the negative aspects of her diagnoses and ignored other, relevant, and mitigating information that was provided to Dr. Holmes by Dr. Butler herself in her extensive mitigation report. For example, Dr. Holmes diagnosed Mr. Smith as "[redacted]" (PC Exhibit 6, Dr. Butler Penalty Phase Report). However, as Dr. Butler explained in her report, "[redacted]" (PC Exhibit 6, Dr. Butler Penalty Phase Report, p. 12) Dr. Butler also noted that Dr. Holmes failed to mention events from Mr. Smith's past and his lack of control or understanding of his behavior, nor did she explain how any of the information she did acknowledge "[redacted]" (PC Exhibit 6, Dr. Butler Penalty Phase Report, p. 10). Trial counsel had the benefit of a seasoned mitigation specialist to help counsel position potentially negative information in a positive light.[13] While Dr. Holmes did not

[13] The American Bar Association (ABA) Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases explains the function of a mitigation specialist in its commentary to Guideline 4.1: "A mitigation specialist is also an indispensable member of the defense team throughout all capital proceedings. Mitigation specialists possess clinical and information-gathering skills and training that most lawyers simply do not have. They have the time

volunteer the above-mentioned helpful facts, it was trial counsel's duty to prepare their expert to present her findings within the mitigating context outlined by Dr. Butler. Trial counsel should have known before putting Dr. Holmes on the stand whether she would be willing to discuss the etiology of his disorders, or describe the disruptive impact they likely had on Mr. Smith's life, etc. Counsel had a duty to verify with Dr. Holmes whether she had anything positive to say about Mr. Smith and would be willing to identify facts that supported mitigation. Counsel failed to direct Dr. Holmes's questioning to show how disorders generally considered aggravating for a defendant can be shown to be mitigating if explained correctly. Counsel's failure to be sure she could elicit favorable testimony from Dr. Holmes before she allowed her to testify is further evidence of ineffective assistance of counsel. This witness's hostility toward Mr. Smith was palpable. For instance, she could barely concede that he would do well in an institutional setting where he would be confined. She first pointed out that he could still get drugs in prison before finally admitting that he did not have a history of violence while incarcerated. V2/R1616-7 Even potentially positive facts were qualified with bad facts.

If counsel had reviewed their expectations with Dr. Holmes during preparation for trial, and she betrayed their understanding once she took the stand, then Dr. Holmes would have become a hostile/adverse witness. At that point, counsel would have had two options. They could have approached the bench and asked the Court to declare her an adverse witness and allowed counsel to ask her leading questions to include what Dr. Holmes may have said more positively during witness preparation. Or counsel could have stopped questioning her to limit the damage. They

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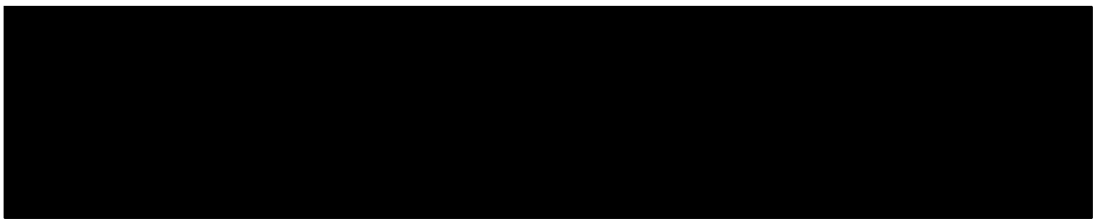
and the ability to elicit sensitive, embarrassing and often humiliating evidence (e.g., [redacted] that the defendant may have never disclosed." ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev. ed. 2003) (footnote omitted).

could then get what they needed through their other defense experts, which is what they should have done in the first place. Competent counsel would never have put their client in this situation to begin with. These comments are only to show that counsel *compounded* their error of calling Dr. Holmes to testify by failing to handle her competently while on the stand.

Dr. Holmes's focus on only the negative attributes of Mr. Smith's mental health disorders and history allowed her to conclude that she saw no evidence to support any of Mr. Smith's available statutory, and non-statutory, mitigation. Dr. Butler noted Dr. Holmes's specific statements regarding Mr. Smith's available statutory mitigators in her report:

In addition to her statements contradicting other mitigation evidence, failing to find or consider any of the diagnosis or history she reviewed to support any statutory mitigator, and essentially conceding Mr. Smith's guilt, Dr. Holmes concluded her deposition testimony by stating:



(PC Exhibit 7, Dr. Holmes Deposition, p. 63). Each of these statements made by Dr. Holmes during

her deposition alone should have had counsel seriously considering the reasonableness of presenting this damaging testimony before Mr. Smith's penalty phase jury. As Dr. Butler explained, Dr. Holmes failed to identify *any* of the probative mitigating aspects of the diagnoses or observations she had of Mr. Smith, or his past. Instead, her deposition testimony focused solely on the negative aspects of her diagnoses and ignored other, relevant, and mitigating information that was provided to Dr. Holmes by Dr. Butler herself in her extensive mitigation report.

The most inexplicable part of trial counsels' decision to call Dr. Holmes was that they had *no* legal or strategic reason to present her testimony during Mr. Smith's penalty phase. (emphasis added) Not only would her damaging statements far outweigh any conceivable probative mitigation she *could have* found –Dr. Holmes had none. Nor was trial counsel left on the eve of trial without sufficient mitigation evidence. As noted by Dr. Butler, trial counsel had a neuropsychologist and a neurologist both prepared to testify regarding Mr. Smith's neurocognitive dysfunction, who had also reviewed the same history constructed by Dr. Butler and were far better able to offer probative substantive evidence for jurors to consider when evaluating his available statutory mitigators. (PC Exhibit 6, Dr. Butler Penalty Phase Report, p. 12-13) These available alternative witnesses could have provided jurors far more persuasive mitigation evidence, still supported the defense theory of mitigation through the introduction of any Baker Act evidence or Mr. Smith's prior convictions and mental health diagnosis, and avoided the presentation of contradictory, damaging testimony which diminished the efficacy of Mr. Smith's overall mitigation presentation, which will be discussed in further detail below. (PC Exhibit 6, Dr. Butler Penalty Phase Report, p. 12-13); (PC Exhibit 9, Dr. Colino Trial Report); (PC Exhibit 10, Dr. Sesta Report); (PC Exhibit 11, Dr. Buffington Report); (PC Exhibit 11, Dr. Sesta Report) (emphasis added.)

At least *Miller's* counsel testified that upon "hearing Dr. Danzinger's deposition testimony . . . [counsel] was forced to reconsider his trial strategy because he realized that Dr. Danzinger's testimony would actually be unfavorable"—and instead of presenting Dr. Danzinger as a defense witness, strategically planned to impeach his testimony on cross-examination when he was inevitably called by the State. Competent counsel, "utilizing their specialized understanding and expertise," would have omitted Dr. Holmes from their penalty phase presentation in light of the damage her cross examination posed in light of her disastrous deposition testimony. Dr. Holmes testified under oath during her deposition to even more problematic and inflammatory statements than those included in her report. There was no tactical or procedural reason for trial counsel to take this risk – the defense had far more probative, mitigation evidence to present on Mr. Smith's behalf. There was no discernable reason for exposing Mr. Smith's jury to this damning evidence. *See* e.g., *Id.*; *see also Sliney*, 944 So.2d at 285. On the contrary, the prejudicial impact the deficient presentation of Dr. Holmes caused to remainder of Mr. Smith's mitigation presentation any probative mitigation presented to Mr. Smith's jury.

In light of these damning statements that would undoubtedly be elicited by the State during cross examination, under *Strickland*, counsel was deficient for their presentation of Dr. Holmes during Mr. Smith's penalty phase. It was not reasonable for counsel to subject Dr. Holmes to cross examination in light of the substantial likelihood that the state would undoubtedly elicit her most egregious observations and conclusions in front of Mr. Smith's penalty phase jury. Allowing Dr. Holmes to testify on Mr. Smith's behalf posed such an obvious and substantial threat to his penalty phase presentation that even *the State* requested a colloquy to ensure Mr. Smith was aware of the inherent risks of defense counsel's decision. The point of the colloquy was to make a record of advising Mr. Smith that seemingly adverse testimony would be used for good purposes, and that

Mr. Smith knew there were some risks to this but understood counsel's strategy. Counsel should have known there was nothing good this expert had to say and no way to limit damaging testimony, so Mr. Smith was misled when he gave his assent. Furthermore, even outside the context of a waiver, it does not save trial counsel from a finding of deficient performance by claiming they acted alongside their clients wishes because the presentation of expert witness testimony is solely within the province of trial counsel and should not shield counsel from the principles required by the Sixth Amendment.

There was no reason for trial counsel to take this risk – the defense had far more probative, mitigation evidence to present on Mr. Smith's behalf, which left no discernable reason for trial counsel to expose Mr. Smith's jury to Dr. Holmes's damaging and contradictory testimony. In fact, the remainder of Mr. Smith's available mitigation presentation rendered the presentation of Dr. Holmes wholly unnecessary and tainted this otherwise probative evidence to Mr. Smith's jury at the onset of his penalty phase presentation and warrants relief.

Under the Sixth Amendment, trial counsel had a constitutional obligation to utilize their professional judgment and avoid the unnecessary harm her presentation had on Mr. Smith's penalty phase objectives. There was no beneficial evidence that purportedly could have come from Dr. Holmes on which trial counsel could claim a reasonable strategy for proceeding with her testimony. On the contrary, even the de minimis mitigation evidence, namely the Baker Act records presented through Dr. Holmes, could have been presented through one of Mr. Smith's available, and far less problematic, defense experts. Thus, counsel's decision to present Dr. Holmes was not only made in the face of substantial risk – but there was also no reward on which to justify this choice. Ultimately, Dr. Holmes's testimony provided only harmful evidence that damaged Mr. Smith's character and contradicted the defense's remaining mitigation presentation.

An evidentiary hearing is warranted because counsel's failure to omit the presentation of Dr. Holmes, and competently avoid any of the unnecessary testimony posed to Mr. Smith, presents a facially sufficient and cognizable claim for relief under *Strickland v. Washington* because counsel's constitutionally ineffective presentation of Dr. Holmes "so undermined the proper functioning of the adversarial process that [Mr. Smith's penalty phase] cannot be relied on as having produced a just result," as required by the Sixth Amendment of the United States Constitution, and under the corresponding portions of the Florida Constitution, warrants relief. *See* 466 U.S. at 685-688.

**B.** The prejudice of counsel's deficiency was overwhelming; there is a reasonable probability of a different outcome had counsel not acted deficiently.

Counsel's unreasonable decisions caused substantial harm to the efficacy of his remaining mitigation presentation and establishes deficient performance under *Strickland. Id.* (PC Exhibit 6 - Dr. Holmes Deposition); (PC Exhibit 8 - Dr. Holmes Report). Mr. Smith was prejudiced because, as anticipated, Dr. Holmes' testimony "was nearly an exact replication of what she had stated during her deposition," and counsel's deficiency caused his jurors to "[hear] expert testimony that presented an incomplete portrayal of Mr. Smith's mental illness." (PC Exhibit 6, Dr. Butler Report, p. 14, 16); *Wiggins*, 539 U.S. at 527. Not only did the statements elicited from her deposition during the state's cross examination demolish Mr. Smith's character and destroy any hope of achieving their goals for mitigation; but even the testimony trial counsel elicited during her direct examination contradicted the conclusions of the other expert witnesses: Dr. Daniel Buffington, pharmacologist, Dr. Geoffrey Colino, neurologist, Dr. Joseph Wu, Dr. Joseph Sesta, neuropsychologist, and Dr. Joseph Wu, radiologist. As Dr. Butler noted, "[i]n summary, [Mr. Smith's other defense experts] testified regarding the significant impact Mr. Smith's acute intoxication had on his decision-making and brain abnormalities likely due to longstanding

substance abuse, age, head trauma, and childhood neglect." (PC Exhibit 6, Dr. Butler Report). In fact, not only did counsels' decision to present Dr. Holmes significantly damage the efficacy of his remaining penalty phase presentation, but by presenting testimony that contradicted the other defense expert opinions as their first witness, counsel effectively tainted all the testimony that followed and ensured jurors would consider the remaining, more probative mitigation evidence, with far less weight. *See Bevel*, 221 So.3d at 1179 (Fla. 2017) (citing *Hurst*, 18 So.3d at 1013; *see also Porter*, 558 U.S. at 41.

Instead of omitting Dr. Holmes from the penalty phase, counsel's decision left jurors without "accurate information with which to decide the presence of mitigation or how such factors should be weighed to determine his ultimate sentence," and resulted in his sentence of death. To begin, the deficient decision to present Dr. Holmes resulted in the following testimony being heard by penalty phase jurors during trial counsel's own direct examination regarding her diagnosis of Mr. Smith:

As Dr. Butler explained, these two disorders do not consist of solely negative attributes described by Dr. Holmes. Instead, as she noted in her report, individuals like Dr. Smith "

[redacted]" (PC Exhibit 6, Dr. Butler Report, p. 14-15). As a result, Dr. Butler explained, "[redacted]" (PC Exhibit 6, Dr. Butler Report, p. 15). Additionally, Dr. Butler noted that people with these personality disorder characteristically "[redacted]" and explained that Mr. Smith himself "[redacted]" (PC Exhibit 6, Dr. Butler Report, p. 15).

Instead of identifying any of these personality disorder characteristics, during cross examination, Dr. Holmes agreed that she testified under oath that she did not find anything mitigating about Mr. Smith, or the circumstances of his crime. V2/R1598. Dr. Holmes also testified on cross that she saw no indication of remorse from Mr. Smith, V2/R1601, and agreed that "[redacted]" V2/R1601. However, as Dr. Butler explained, there is a "[redacted]" and that "[redacted]" (PC Exhibit 6, Dr. Butler Report, p. 15). Ultimately, as Dr. Butler explained, this is one of the "[redacted]" (PC Exhibit 6, Dr. Butler Report, p. 15). This information would have provided far better context in the circumstances of his crime – and could have been far better supported by testimony far less inflammatory and damning by explaining [redacted] "[redacted]" *See Bevel*, 221 So. 3d at 1181, 118.

Dr. Holmes also testified, contradicting the other defense expert opinions, that Mr. Smith suffered from no brain damage and agreed with the State that "[t]here is nothing in your evaluation, opinion, or testimony before the jury that is offered as mitigation related to him or his offense." V2R1609. Holmes downplayed or omitted important mitigating information from his past. Dr. Holmes could not think of any event or circumstance that contributed to his mental illnesses other than cocaine use will lower inhibitions. V2/1591 Dr. Homes characterized his relationship with his mother as "[redacted]" V2/1579 She further testified that the absence of other close relationships was due to moving around a lot. She phrased it, "[redacted]" V2/1580 This conflicted with the testimony offered by Dr. Butler describing the early abusive years he spent with his grandmother who was cold and unaffectionate. V2/R1942, 1945, 1948 Dr. Homes failed to mention that Mr. Smith's relatives considered him gorgeous and too perfect to touch – much like you would protect a porcelain doll from breaking. Consequently, Dr. Butler explained that actually "[redacted] Dr. Wu revealed that "[redacted]" (PC Exhibit 6, Dr. Butler Report, p. 15).

The only seemingly probative evidence elicited from Dr. Holmes, was potentially the admission of Mr. Smith's [redacted] records that show Mr. Smith attempted to institutionalize himself to protect the dangers he posed to society. Dr. Butler noted, however, that this strategy would not have been reasonable because even her deposition revealed that "Dr. Holmes appeared to ignore one of the most pivotal events in the case: On June 9, 2013, less than two weeks before

the offense, Mr. Smith attempted to confine himself by telling the Mental Health Resource Center he was having homicidal and suicidal ideations." He was then placed on an involuntary 72-hour psychiatric hold but was released shortly thereafter." The victim was found murdered on June 22, 2013. However, Dr. Sesta, Dr. Colino, Dr. Buffington and Dr. Butler all also reviewed these records and would have been a far more appropriate witnesses to admit and present this evidence through. Because the testimony of Dr. Holmes considerably harmed any chance of efficacy of his penalty phase presentation. Instead, Dr. Holmes did nothing more than discredit the probative mitigation Dr. Buffington, Dr. Colino, and Dr. Butler did present on Mr. Smith's behalf. Holmes provided no probative mitigation evidence, and her testimony was wholly unnecessary in light of the other available mitigation evidence ultimately presented on Mr. Smith's behalf. As Dr. Butler concluded in her postconviction report, Mr. Smith's jury "heard expert testimony that presented an incomplete portrayal of Mr. Smith's mental illness," based on the testimony of Dr. Holmes, which left jurors without "accurate information with which to describe the presence of mitigation or how such factors should be weighed to determine his ultimate sentence." (PC Exhibit 6, Dr. Butler Report, p. 15-16). This directly resulted in jurors finding of a sentence of death. Thus, trial counsel's presentation of Dr. Holmes during Mr. Smith's penalty phase was prejudicially deficient performance by trial counsel and relief is warranted under *Strickland*. *See Strickland*, 466 U.S at 687; *see also Bevel*, 221 So.3d at 1179 (Fla. 2017) (citing *Hurst*, 18 So.3d at 1013; *see also Porter*, 558 U.S. at 41.

**2) The colloquy prior to the testimony of Dr. Holmes did not overcome Mr. Smith's right to the effective assistance of counsel because Mr. Smith and the trial court were misled by trial counsel.**

A pre-trial colloquy was conducted by the trial court regarding the presentation of Dr. Holmes after being *prompted by the state*, upon the commencement of Mr. Smith's penalty phase

proceedings. V2R1488. The colloquy was requested based on concern about statements from her deposition and report that the prosecutor believed to "almost equate to being an admission to a lesser included offense based upon what [was] [tendered]." V2R1488-1489. However, Mr. Smith's responses to the court's questioning did not constitute an effective waiver of his Sixth Amendment right to effective counsel and does not preclude relief from counsel's ineffective assistance under *Strickland* in the present motion.

The Court and Mr. Smith were never informed of the extent of the truly horrible testimony that Dr. Holmes would provide. Counsel had a duty to inform both the court and their client of how bad Dr. Holmes's testimony would be. Counsel should have known what Dr. Holmes would testify to before calling her as a witness. Counsel needed to look no further than Dr. Holmes's report and deposition, both of which the court had no knowledge. Mr. Smith could not consent to what counsel did not adequately explain to him. There were significant risks posed to him by Dr. Holmes testifying and if informed of them by counsel Mr. Smith would never have acquiesced to this. Mr. Smith certainly never waived his right to effective counsel. Any statement by counsel to Mr. Smith that the harm anticipated by even the State could be mitigated was fundamentally misleading. Allowing Mr. Smith to engage in a colloquy without fully advising him of the futility of attempting to obtain any mitigation from Dr. Holmes and without considering the harm that was inevitable was ineffective in itself. The trial court could not accept the waiver as knowing, intelligent and voluntary because it was based on the misleading of the Court and Mr. Smith. Getting a mentally ill, brain damaged individual to agree to trial counsel's folly is hardly a constitutional waiver. Trial counsel should never have called Dr. Holmes even if Mr. Smith insisted upon it. This was counsel's fault alone.

Relief is warranted under *Strickland* because the responsibility to competently avoid the

presentation of harmful mitigation evidence based on their specialized legal experience and training was the duty and province of counsel alone. *See e.g.*, *McCoy v. Louisiana*, 130 S.Ct. 1500, 1508 (Explaining that "[t]rial management is the lawyer's province: Counsel provides his or her assistance by making decisions such as 'what argument to pursue, what evidentiary objections to make, and what arguments to conclude regarding the admission of evidence.") (citing *Gonzalez v. U.S.*, 553 U.S. 242, 248 (2008)) (internal quotation marks and citations omitted). Ultimately, the responsibility to avoid exposing Mr. Smith to unnecessary harm required the independent and affirmative duty of counsel alone under the Sixth Amendment, because the evaluation of the potential dangers posed by her testimony required a legal understand complex evidentiary considerations regarding the procedural harm faced by Mr. Smith regarding their presentation of Dr. Holmes would procedurally cause Mr. Smith by opening the door to evidence that was otherwise inadmissible as a matter of law. *See e.g.*, *McCoy*, 130 S.Ct. at 1508; *see also Gonzalez,* 553 U.S. *at* 248. Weighing the existence of any probative mitigation evidence against the substantial danger the presentation of Dr. Holmes posed to Mr. Smith in the likely event jurors heard her most damaging observations during the state's cross examination, and the necessary consideration regarding what effect this otherwise inadmissible evidence could have on the persuasiveness of their overall mitigation presentation and availability to the state of otherwise inadmissible aggravation evidence is, "precisely the type of complicated [legal question]" the Sixth Amendment requires competent counsel use their legal training and experience to make. *See McCoy*, 130 S.Ct. at 1508.; *see also Gonzalez*, 553 U.S. at 248.

Thus, under the Sixth Amendment, the ultimate decision to present Dr. Holmes was the responsibility of trial counsel alone because Mr. Smith could not fully understand the potential dangers posed by her testimony and required the exercise of their duty under the Sixth Amendment

to provide competent legal expertise to Mr. Smith. *U.S. v. Garcia*, 517 F.2d 272 (5th Cir. 1975). Instead, Mr. Smith's counsel failed in that duty and any supposed assent during the trial court's colloquy to counsel's unreasonable strategy did not reveal his assent was made with sufficient knowledge of the dangers and lack of probative evidence her testimony presented to "unequivocally and intelligently" establish a waiver of his constitutional rights, nor does his mere assent preclude an evaluation under *Strickland*. *See Hammond v. Hall*, 586 F.3d 1289, 1327-28 (11th Cir. 2009); see also *Gonzalez*, 553 U.S. at 248; *see also e.g.*, *Taylor*, 484 U.S. at 417-418 (1988).

A defendant's Sixth Amendment right to effective counsel can only be waived "competently and intelligently." *See Ross v. Wainwright*, 738 F.2d 1217, 1221 (11th Cir. 1984) (citing *Johnson v. Zerbst*, 304 U.S. 458 (1938)). However, special care must be exercised by the trial judge to ensure that "the defendant's voluntariness and knowledge of the consequences of [counsel's action] will be manifest on the fact of the record." *See Id.* (citing *Garcia*, 517 F.2d at 272) (internal citations omitted)). The trial court must also be forthright in advising the defendant of potential dangers of a particular course of action during the colloquy. *See Garcia*, 517 F.2d at 274. Ideally, the court should elicit a narrative response from the defendant. *See Id.* "Mere assent in response to a series of questions from the bench may in some circumstances constitute an adequate waiver, but the court should nonetheless endeavor to have each defendant personally articulate in detail his intent to forego this significant constitutional protection." *See Id.* The trial court could not do this because the court and Mr. Smith were unaware of the true perils of calling Dr. Holmes.

While counsel maintains a duty under the Sixth Amendment to discuss potential trial strategies with the defendant, the Supreme Court has long held that this obligation "does not

require counsel to obtain the defendant's consent to 'every tactical decision." *Florida v. Nixon*, 543 U.S. 175, 187 (2004) (quoting *Taylor*, 484 U.S. at 417-418 (1988)). Instead, the Supreme Court has consistently established that counsel maintains the authority, and duty, under the Sixth Amendment to competently manage a client's defense without need for client consent, -- as long as it is not a decision regarding the exercise or waiver of a basic trial right. *see e.g.*, *Taylor*, 484 U.S. at 417-418. The Supreme Court has made clear that counsel alone is best suited to utilize their expertise to competently consider "[n]umerous choices affecting conduct of the trial. . . [which] depend not only [on] what is permissible under the rules of evidence and procedure but also upon tactical consideration of the moment and the larger strategic plan for the trial." *Gonzalez*, 553 at 249. Trial counsel's duty regarding the presentation of potential expert witness testimony is precisely the type of complicated procedural issues the Sixth Amendment envisioned would require the competent assistance of counsel once the defendant elected representation. *See e.g., U.S. v. Garcia*, 517 F.2d 272 (5th Cir. 1975); *See e.g.*, *McCoy* 130 S.Ct. at 1509; *see also Gonzalez*, 553 U.S. at 248.

The complex factual and legal decisions like the one faced by counsel here regarding the presentation of Dr. Holmes during Mr. Smith's penalty phase necessitated the type of evidentiary considerations and required the navigation of complex issues regarding sufficiency of the evidence and potential danger of constitutional harm. Once the defendant has elected representation, competent assistance of counsel envisioned by the Sixth Amendment was required to evaluate the potential of Dr. Holmes based on their legal experience and expertise. *See e.g.*, *McCoy* 130 S.Ct. at 1509; *see also Gonzalez*, 553 U.S. at 248 ("The presentation of a criminal defense can be a mystifying process even for well-informed laypersons. This is one of the reasons for the right to counsel").

Mr. Smith unequivocally failed to possess the legal knowledge and expertise required for him to be able to sufficiently understand the complex danger the testimony of Dr. Holmes posed to the viability and efficacy of his overall penalty phase presentation. That is why the Sixth Amendment requires an affirmative duty of effective counsel to independently evaluate the risk each defense strategy may pose to a criminal defendant within the procedure of the trial itself. *See e.g.*, *McCoy*, 130 S.Ct. at 1508-1509; *see also Strickland*, 466 U.S. at 488-491. This is the heart of the reason the United States Supreme Court has long considered trial management as falling squarely within the lawyer's province based on counsel's specialized understanding and legal expertise. *See McCoy*, 130 S.Ct. at 1508 (citing *Gonzalez*, 553 at 249) (Identifying issues regarding trial management that typically present "[n]umerous choices affecting conduct of the trial. . . [and] depend not only upon what is permissible under the rules of evidence and procedure but also upon tactical consideration of the moment and the larger strategic plan for the trial.") Thus, trial counsel retains autonomy and the affirmative Sixth Amendment duty "to utilize their specialized understanding and expertise, by making competent [decisions about procedural, trial management issues] such as what argument to pursue, what evidentiary objections to make, and what arguments to conclude regarding the admission of evidence." *See e.g.*, *McCoy* 130 S.Ct. at 1509; *see also Gonzalez*, 553 U.S. at 248; *see also e.g.*, *Taylor*, 484 U.S. at 417-418 ("Although there are basic rights that the attorney cannot waive without the fully informed and publicly acknowledged consent of the client, the lawyer has—and must have—full authority to manage the conduct of the trial.")

Understanding the unnecessary risk of exposing Dr. Holmes to cross examination in front of Mr. Smith's penalty phase jury is "precisely the type of complicated [legal question]" that the Sixth Amendment requires competent counsel to use their legal training and experience to make.

*See Strickland; See e.g.*, *Gonzalez*, 553 U.S. at 248 ("In exercising professional judgment, moreover, the attorney draws upon the expertise and experience that members of the bar should bring to the trial process" as the Sixth Amendment requires). *Only* trial counsel had the experience and knowledge to understand that the expertise, qualifications, and records reviewed by either the Pharmacologist, Neuropsychologist, or Neurologist Mr. Smith had retained and prepared to present on his behalf, rendered the need to present Dr. Holmes as a witness wholly unnecessary. Therefore, instead of acting as a sufficient waiver of Mr. Smith's Sixth Amendment right under *Strickland* to precluding collateral attack regarding trial counsel's ineffective assistance; the trial court's colloquy made clear that Mr. Smith did not waive trial counsel's constitutional obligation to utilize their professional judgment and avoid any unnecessary harm to his penalty phase objectives, which were to show Mr. Smith could not control his impulses, suffered from neurocognitive dysfunction, and attempted [redacted] himself two weeks before the event. *See e.g.*, *Gonzalez*, 553 U.S. at 248; (PC Exhibit 6, Dr. Butler Penalty Phase Report, p. 12). Thus, the deficient presentation of Dr. Holmes during Mr. Smith's penalty phase was not waived by Mr. Smith, and this claim warrants relief under *Strickland*. *See* 466 U.S. at 687.

The record is clear that Mr. Smith did not waive any Sixth Amendment right to effective counsel "competently and intelligently" and that the colloquy conducted by the trial court did not preclude his right to collateral review of counsel's deficient presentation of Dr. Holmes under *Strickland*. *See Ross*, 738 F.2d at 1221; *see also Hammond*, 586 F.3d at 1327-28; *see also* ROA V/2 p.1491. Instead of acting as a sufficiently informed waiver of Mr. Smith's right under *Strickland* to a later collateral attack regarding trial counsel's ineffective assistance; the trial court's colloquy made clear that Mr. Smith had been misled by trial counsel and was left unaware of the unnecessary dangers Dr. Holmes's testimony posed to the remainder of his mitigation

presentation. The colloquy also failed to inform or ascertain if Mr. Smith understood that assent to the defense strategy regarding Dr. Holmes could constitute a waiver of his Sixth Amendment rights and any future collateral claim of ineffective assistance of counsel. *See Ross*, 738 F.2d at 1221. V/2R1488-1491. The record itself indicates that Mr. Smith, the trial court, and even the state, were all under the erroneous impression that his trial counsel would "obviously . . . argue [Dr. Holmes' testimony] for mitigation purposes." V/2R1488-1490. It would appear from what the State put on the record that the State was made to believe that the defense had a strategy in mind that could put the negative information to a positive use. As was demonstrated from the complete lack of any mitigating testimony from Dr. Holmes, the Court, the State and most importantly, Mr. Smith were misinformed. The Court cannot advise Mr. Smith of the potential dangers of allowing Dr. Holmes to testify if the Court is misled as to the fact that *no mitigation* would be elicited from Dr. Holmes. Counsel should have used their sufficient expertise and legal vantage point to conclude there was no probative evidence worth eliciting from Dr. Holmes, that could not have otherwise been accomplished with far less harm to Mr. Smith's penalty phase presentation.

Mr. Smith was not asked about with any specificity, nor was he seemingly aware, of the impact Dr. Holmes' contradictory statements would have on the remainder of his mitigation presentation and how it directly conflicted with his other expert opinions. (PC Exhibit 6, Dr. Butler Penalty Phase Report, p. 12). The Court was not in a position to make such an inquiry, because no one informed the Court of this situation. Trial counsel prevented the Court's colloquy from being meaningful. Mr. Smith was advised by counsel that they could limit the damaging parts of Dr. Holmes's opinion. However, they never advised Mr. Smith that on cross examination, the State would be allowed to address all negative information that came out in Dr. Holmes's deposition and in her report. As Dr. Butler explained in her postconviction report and referenced in greater

detail below, the testimony of Dr. Holmes would contradict and/or diminish his remaining probative mitigation evidence. This point was not part of the trial court's questioning. V/2R1488-1490. In fact, what was unequivocally established from the face of the record was that neither Mr. Smith, nor the state or trial court, fully understood the danger Dr. Holmes's opinions posed to his remaining penalty phase presentation. V/2R1488-1491.

Mr. Smith's assent to the Court's colloquy was based on a false premise - that trial counsel had a meaningful defense strategy behind the defense presentation of Dr. Holmes and whether trial counsel had any ability to limit the type of damning evidence from her deposition in exchange for any helpful information. V/2R1488-1490; *See Garcia*, 517 F.2d; *see also Ross*, 738 F.2d at 1221. It was never established that Mr. Smith fully understood the threat posed by exposing Dr. Holmes to cross examination. If counsel had advised Mr. Smith of the damage the State could do on cross examination, then they should have asked the Court to remind Mr. Smith that the State would have a right to cross examine Dr. Holmes and elicit information that trial counsel had tried to avoid in direct examination. In this way, they would be making a record that their client was fully informed. It was also unexplored, because the Court had no way of knowing, whether Mr. Smith realized counsel would not be able to downplay or limit *any* prior statement produced by Dr. Holmes in her opinion and deposition – not just the "prior Jimmy Ryce commitments, prior convictions, contacts with the justice system," that the state acknowledged during the trial court's colloquy would not otherwise be admissible evidence without the defense opening the door to through the presentation of Dr. Holmes herself. V/2R1488-1489. Mr. Smith's mere assent to the trial court's questioning showed that any acquiescence made regarding the proposed defense strategy during his colloquy was not a "competent and intelligent waiver of his [Sixth Amendment Right]" *Ross*, 738 F.2d at 1221; *see also Garcia*, 517 F.2d at 274.

Thus, counsel was deficient under *Strickland* because no reasonable strategy could justify presenting the testimony of Dr. Holmes. Her testimony was purely aggravation evidence and provided no mitigating information on Mr. Smith's behalf. *See Simmons* at 506 (citing *Sliney v. State*, 944 So.2d 270, 285 (Fla. 2006); *see also Rutherford*, 727 So.2dd at 223 (Fla. 1998). Unlike in those cases that deal with the omission of evidence, Mr. Smith's penalty phase counsel engaged in the anomalous situation of presenting what they *already knew* would be damaging statements by a hired expert who believed their client to be wholly without mitigation or any availing characteristic worth of redemption. (emphasis added). *See* e.g., *Wiggins*, 539 U.S. at 527. There was also no need for counsel to investigate further – the statements Dr. Holmes provided were her confirmed testimony and opinion found both in her deposition given under oath and in her report. *Id.* Counsel unreasonably proceeded with the knowledge that her proposed testimony would discredit the more probative mitigation evidence Mr. Smith had available through other experts and prevent him from achieving his own desired penalty phase objectives. *See Simmons* at 506 (citing *Sliney v. State*, 944 So.2d 270, 285 (Fla. 2006); *see also Rutherford*, 727 So.2dd at 223 (Fla. 1998).

**CLAIM 6: The Cumulative Impact of Counsel's Deficient Penalty Phase Presentation of Mr. Smith's Requires Relief Under the Fourth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and corresponding provisions of the Florida Constitution.**

Taken together, all of the above-mentioned penalty phase claims in totality warrant a new penalty phase proceeding. While each of the individual errors of counsel during these penalty phase proceedings warrant relief alone, the fact remains that addressing these errors on an individual bases may not safeguard against an improperly imposed death sentence. *See Heath*, 941 F.2d at 1126; *Derden*, 938 F.2d at 605. Here, counsel's unreasonable decisions regarding the presentation of Dr. Holmes and Dr. Butler so wholly damaged Mr. Smith's penalty phase

presentation that a new proceeding is warranted. Especially when during voir dire, counsel ineffectively permitted jurors who strongly believed in the death penalty for crimes like the one Mr. Smith was convicted of to be seated on the jury; and who then failed to act as counsel as envisioned by the Sixth Amendment. The cumulative effects of counsel's deficiencies during Mr. Smith's penalty phase warrant a new penalty phase trial because the sheer number and types of errors involved in his trial at both the guilt and penalty phases, when considered as a whole, virtually dictated the sentence that he would receive. *See Gunsby*, 670 So. 2d at 920.

## C. CONCLUSION AND RELIEF SOUGHT

Mr. Smith requests the following relief, based on his prima facie allegations demonstrating violation of his constitutional rights:

1) That he be allowed leave to amend this motion should new claims, facts, or legal precedent become available to counsel;

2) That he be granted an evidentiary hearing at a reasonable time; and

3) That his judgments and sentences be vacated.

## D. CERTIFICATION

The undersigned attorneys hereby verify that the contents of this motion have been discussed fully with the Defendant, that Rule 4-1.4 of the Rules of Professional Conduct has been complied with, and that this motion is filed in good faith.

Respectfully submitted,

/s/ Ann Marie Mirialakis
ANN MARIE MIRIALAKIS
Florida Bar No. 658308
Assistant CCRC

/s/ Adriana Corso
ADRIANA CORSO
Florida Bar No. 112427

Assistant CCRC

/s/ Michael R. Hope
MICHAEL R. HOPE
Florida Bar No. 975427
Assistant CCRC

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 6th day of January 2023, I electronically filed the foregoing motion with the Clerk of the Circuit Court by using the Florida Courts e-portal filing system which will send a notice of electronic filing to the following: The Honorable Mallory Cooper, Circuit Judge, mcooper@coj.net; bpowell@coj.net; Charmaine M. Millsaps, Assistant Attorney General, Charmaine.Millsaps@myfloridalegal.com; capapp@myfloridalegal.com; Mark Caliel, Assistant State Attorney, MCaliel@coj.net; I further certify that a copy has been furnished by U.S. Mail to Donald James Smith, Sr., DOC# 986205, Union Correctional Institution, P.O. Box 1000, Raiford, FL 32083.

/s/ Ann Marie Mirialakis
ANN MARIE MIRIALAKIS
Florida Bar No. 658308
Assistant CCRC

/s/ Adriana Corso
ADRIANA CORSO
Florida Bar No. 112427
Assistant CCRC

/s/ Michael R. Hope
MICHAEL R. HOPE
Florida Bar No. 975427
Assistant CCRC

CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE REGION
12973 N. Telecom Parkway

Temple Terrace, Florida 33637
813-558-1600
813-558-1601 (Facsimile)

**IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA**

**STATE OF FLORIDA,**

Plaintiff,

**v.**

**DONALD JAMES SMITH, SR.,**

Defendant.
_____/

**CASE NO.: 16-2013-CF-05781-AXXX**

**DIVISION: CR-D
POSTCONVICTION CAPITAL CASE**

**ATTACHMENT TO RULE 3.851 MOTION FOR POSTCONVICTION RELIEF**

Judgment and Sentence

Doc # 2018104729, OR BK 18373 Page 1222, Number Pages: 9,
Recorded 05/03/2018 09:43 AM, RONNIE FUSSELL CLERK CIRCUIT COURT DUVAL COUNTY

IN THE CIRCUIT COURT,
FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY,
FLORIDA

CASE NUMBER: 16-2013-CF-005781-AXXX-MA
DIVISION: CR-D (Circuit)

STATE OF FLORIDA
vs.
DONALD JAMES SMITH, DEFENDANT

☐ Probation Violator
☐ Community Control Violator
☐ Retrial
☐ Resentence

## JUDGMENT

The defendant, **DONALD JAMES SMITH**, being personally before this Court, represented by Julie Schlax, Appt'd, the attorney of record, and the State being represented by Mark Caliel, and having:

☒ been tried and found guilty by jury/~~by court~~ of the following crime(s)
☐ entered a plea of guilty to the following crime(s)
☐ entered a plea of nolo contendere to the following crime(s)

| Count | Crime | Offense Statute Number(s) | Degree Of Crime |
|---|---|---|---|
| 1 | MURDER IN THE FIRST DEGREE | 782.04(1)(a) | FC |
| | | | |
| 2 | KIDNAPPING A CHILD UNDER THE AGE OF 13 YEARS | 787.01(3)(a) | FL |
| | | | |
| 3 | SEXUAL BATTERY ON A CHILD LESS THAN 12 YEARS OLD | 794.011(2)(a) | FC |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |

☒ and no cause being shown why the defendant should not be adjudicated guilty; IT IS ORDERED that the defendant is hereby ADJUDICATED GUILTY of the above crime(s).

☐ being a qualified offender pursuant to F.S. 943.325, the defendant shall be required to submit a DNA sample as required by law.

☐ and good cause being shown; IT IS ORDERED THAT ADJUDICATION OF GUILT BE WITHHELD.

FILED
MAY 02 2018
RONNIE W. FUSSELL
CLERK CIRCUIT COURT

STATE OF FLORIDA
vs.
DONALD JAMES SMITH, DEFENDANT

CASE NUMBER: 16-2013-CF-005781-AXXX-MA

| FINGERPRINTS OF DEFENDANT | | | | |
|---|---|---|---|---|
| 1. Right Thumb | 2. Right Index | 3. Right Middle | 4. Right Ring | 5. Right Little |
|  |  |  |  |  |
| 6. Left Thumb | 7. Left Index | 8. Left Middle | 9. Left Ring | 10. Left Little |
|  |  |  |  |  |

Fingerprints taken by: Name: J C FARRAR 67870 Title: J. O.

I HEREBY CERTIFY that the above and foregoing are the fingerprints of the defendant, **DONALD JAMES SMITH**, and that they were placed thereon by the defendant in my presence in open court on this date.

DONE AND ORDERED in open court in Jacksonville, Duval County, Florida, this 2nd day of MAY, 2018.

Judge

Page 2 of 9

STATE OF FLORIDA

vs.
DONALD JAMES SMITH, DEFENDANT

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY FLORIDA
CASE NUMBER: 16-2013-CF-005781-AXXX-MA
DIVISION: CR-D (Circuit)

## COURT ORDERED COSTS/FINES/FEES

The defendant is hereby ordered to pay the following sums if checked:

- ☒ A sum of $3.00 as a court cost pursuant to section 938.01, Florida Statutes, (Additional Court Cost Clearing Trust Fund).
- ☒ A sum of $50.00 pursuant to section 938.03, Florida Statutes, (Crimes Compensation Trust Fund).
- ☒ A sum of $225.00 pursuant to section 938.05, Florida Statutes, (Local Government Criminal Justice Trust Fund).
- ☒ A sum of $3.00 pursuant to section 938.19, Florida Statutes, and section 634.108, Ordinance Code, (Assessment of Additional Court Costs-Duval County Teen Court Trust Fund).
- ☒ A sum of $65.00 pursuant to section 939.185(1)(a), Florida Statutes, and section 634.102(c), Ordinance Code, (Assessment of Additional Court Costs to be used for innovations, legal aid, law library, teen court programs).
- ☐ A sum of $100.00 pursuant to section 938.055, Florida Statutes, (FDLE Operating Trust Fund).
- ☐ A sum of $100.00 pursuant to section 938.27(1), Florida Statutes, (Sheriff's Office Investigative Cost).
- ☒ A sum of $14946.74 pursuant to section 938.27(8), Florida Statutes, (Cost of Prosecution).
- ☒ A sum of $20.00 pursuant to section 938.06, Florida Statutes, (Assessment of Additional Court Costs for Crime Stoppers Trust Fund).
- ☒ A sum of $100.00 pursuant to section 938.29, Florida Statutes, (Court Appointed Counsel Fees).
- ☒ A sum of $50.00 pursuant to section 27.52, Florida Statutes, (Application for Court Appointed Counsel Fees).
- ☒ A sum of $302.00 pursuant to section 938.10, Florida Statutes, (Crimes Against Minors).
- ☒ A sum of $201.00 pursuant to section 938.08, Florida Statutes, (Funding Programs in Domestic Violence).
- ☒ A sum of $302.00 pursuant to section 938.085, Florida Statutes, (Rape Crisis Trust Fund).
- ☒ A sum of $50.00 pursuant to section 775.083(2), Florida Statutes, (Cost).
- ☐ A fine in the sum of $ _____ pursuant to section 775. 0835, Florida Statutes, (This provision refers to the optional fine for the Crimes Compensation Trust Fund and is not applicable unless checked and completed. Fines imposed as a part of a sentence to section 775.083, Florida Statutes, are to be recorded on the sentence page(s)).
- ☐ A sum of $_____ pursuant to section 938.04, Florida Statutes, (additional cost 5% of fine).
- ☒ A sum of $2.00 as a court cost pursuant to section 938.15, Florida Statutes, (Criminal Justice Education by Municipalities and Counties).
- ☐ A sum of $15.00 pursuant to section 938.13, Florida Statutes, (Misd. convictions involving drugs or alcohol).
- ☐ A sum of $135.00 pursuant to section 938.07, Florida Statutes, (EMS – DUI/BUI cases).
- ☐ A sum of $30.00 pursuant to section 318.18(13), Florida Statutes, and section 634.102, Ordinance Code, (CHT - State Court Facilities).
- ☐ A sum of $3.00 pursuant to section 318.18(17), Florida Statutes, (State Radio System (SRS)).
- ☐ A sum of $_____ for the cost of collecting the DNA sample required by section 943.325, Florida Statutes.
- ☒ Restitution in accordance with attached order.
- ☐ Other _____.

DONE AND ORDERED in open court in Jacksonville, Duval County, Florida, this 27th day of May, 2018.

Judge

DONALD JAMES SMITH, DEFENDANT

CASE NUMBER:16-2013-CF-005781-AXXX-MA
OBTS # _____

## SENTENCE

(As to Count(s) 1)

The defendant, being personally before this court, accompanied by the defendant's attorney of record Julie Schlax, Appt'd, and the adjudication/withhold having been determined, and the court having given the defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why the defendant should not be sentenced as provided by law, and no cause being shown:

☒ and the court having on 02/14/2018 deferred imposition of sentence until this date.
☐ and the court having previously entered a judgment in this case on _____ now resentences the defendant.
☐ and the court having placed the defendant on probation/community control, and having subsequently revoked the defendant's probation/community control;

**It Is The Sentence Of The Court That (check all that are applicable; unmarked sections are inapplicable):**

☐ The defendant pay a fine of $_____, pursuant to section 775.083, Florida Statutes plus $_____at the 5% surcharge required by section 938.04, Florida Statutes.
☒ The defendant is hereby committed to the custody of the Department of Corrections.
☐ The defendant is hereby committed to the custody of the Sheriff of Duval County, Florida.
☐ The defendant is sentenced as a Youthful Offender in accordance with section 958.04, Florida Statutes.

**To be Imprisoned (check one; unmarked sections are inapplicable):**

☐ For a term of natural life.
☒ For a term of Death.
☐ Said SENTENCE SUSPENDED for a period of _____ subject to conditions set forth in this order.
☐ Youthful Offender Sentence:
Pursuant to the Florida Youthful Offender Act, the defendant is hereby sentenced to _____, of which _____shall be served by incarceration followed by _____ in a Community Control Program according to the terms and conditions set forth in a separate order.

☐ Split Sentence (complete the appropriate paragraph):
☐ Followed by a period of _____ on probation/community control under the supervision of the Department of Corrections according to the terms and conditions of supervision set forth in a separate order.
☐ However, after serving a period of _____ imprisonment in _____, the balance of sentence shall be suspended and the defendant shall be placed on probation/community control for a period of _____ under the supervision of the Department of Corrections according to the terms and conditions of probation/community control set forth in a separate order.

In the event the defendant is ordered to serve additional split sentences, all incarceration portions shall be satisfied before the defendant begins service of the supervision terms.

**Imposition of Sentence Stayed and Withheld (check one; unmarked sections are inapplicable):**

☐The court hereby stays and withholds the imposition of sentence and places the defendant on:
☐ Probation/community control for a period of _____under the supervision of the Department of Corrections with a special condition that the defendant serve _____in Duval County Jail, with credit for _____days.
☐ Unsupervised probation for a period of _____with the special condition that the defendant serve _____ days in Duval County Jail, with credit for _____days. Unsupervised probation will terminate upon completion of special condition.

(All other general/special conditions of probation/community control shall be set forth in a separate order.)

DONALD JAMES SMITH, DEFENDANT

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## SENTENCE

(As to Count(s) 2-3 )

The defendant, being personally before this court, accompanied by the defendant's attorney of record Julie Schlax, Appt'd, and the adjudication/withhold having been determined, and the court having given the defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why the defendant should not be sentenced as provided by law, and no cause being shown:

- ☒ and the court having on 02/14/2018 deferred imposition of sentence until this date.
- ☐ and the court having previously entered a judgment in this case on _____ now resentences the defendant.
- ☐ and the court having placed the defendant on probation/community control, and having subsequently revoked the defendant's probation/community control;

**It Is The Sentence Of The Court That (check all that are applicable; unmarked sections are inapplicable):**

☐ The defendant pay a fine of $_____, pursuant to section 775.083, Florida Statutes plus $_____at the 5% surcharge required by section 938.04, Florida Statutes.

☒ The defendant is hereby committed to the custody of the Department of Corrections.

☐ The defendant is hereby committed to the custody of the Sheriff of Duval County, Florida.

☐ The defendant is sentenced as a Youthful Offender in accordance with section 958.04, Florida Statutes.

**To be Imprisoned (check one; unmarked sections are inapplicable):**

☐ For a term of natural life.

☒ For a term of Life.

☐ Said SENTENCE SUSPENDED for a period of _____ subject to conditions set forth in this order.

☐ Youthful Offender Sentence:

Pursuant to the Florida Youthful Offender Act, the defendant is hereby sentenced to _____, of which _____shall be served by incarceration followed by _____ in a Community Control Program according to the terms and conditions set forth in a separate order.

☐ Split Sentence (complete the appropriate paragraph):

- ☐ Followed by a period of _____ on probation/community control under the supervision of the Department of Corrections according to the terms and conditions of supervision set forth in a separate order.
- ☐ However, after serving a period of _____ imprisonment in _____, the balance of sentence shall be suspended and the defendant shall be placed on probation/community control for a period of _____ under the supervision of the Department of Corrections according to the terms and conditions of probation/community control set forth in a separate order.

In the event the defendant is ordered to serve additional split sentences, all incarceration portions shall be satisfied before the defendant begins service of the supervision terms.

**Imposition of Sentence Stayed and Withheld (check one; unmarked sections are inapplicable):**

☐The court hereby stays and withholds the imposition of sentence and places the defendant on:

- ☐ Probation/community control for a period of _____under the supervision of the Department of Corrections with a special condition that the defendant serve _____in Duval County Jail, with credit for _____days.
- ☐ Unsupervised probation for a period of _____with the special condition that the defendant serve _____ days in Duval County Jail, with credit for _____ days. Unsupervised probation will terminate upon completion of special condition.

(All other general/special conditions of probation/community control shall be set forth in a separate order.)

DONALD JAMES SMITH, DEFENDANT

CASE NUMBER:16-2013-CF-005781-AXXX-MA
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## OTHER PROVISIONS

(As to Count(s) 1 & 2 )

**Current Jail Credit Time:** ☒ It is further ordered that the defendant shall be allowed a total of 1775 days as credit for time incarcerated on this case / count before imposition of this sentence.

**Credit for Time Served on Violation of Probation / Community Control:**
**(check one)**

☐ It is further ordered that the defendant shall be allowed _____ days time served between date of arrest as a violator following release from prison to the date of resentencing. The Department of Corrections shall apply original jail time credit and shall compute and apply credit for time served only pursuant to section 921.0017, Florida Statutes, on count(s) _____. (Offenses committed on or after January 1, 1994.)

☐ It is further ordered that the defendant be allowed _____days time served between date of arrest as a violator following release from prison to the date of resentencing. The Department of Corrections shall apply original jail time credit and shall compute and apply credit for time served and unforfeited gain time previously awarded on count(s)_____. (Offenses committed before October 1, 1989.)

☐ It is further ordered that the defendant be allowed _____ days time served between date of arrest as a violator following release from prison to the date of resentencing. The Department of Corrections shall apply original jail time credit and shall compute and apply credit for time served on count(s) _____. (Offenses committed between October 1, 1989, and December 31, 1993.)

**Prior Prison Credit:** ☐ It is further ordered that the defendant shall be allowed _____ days time served between date of the original sentence being vacated to the date of resentencing. The Department of Corrections shall apply original jail time credit and shall compute and apply credit for time served on count(s) _____.

**Forfeiture of Prior Gain/Good Time:**
**(check one)**

☐The court deems the unforfeited gain time previously awarded on the above count(s) forfeited under section 948.06(7)

OR

☐ The court allows unforfeited gain time previously awarded on the above count(s).
(Gain time may be subject to forfeiture by the Department of Corrections under section 944.28(1))

**Consecutive/ Concurrent As to Other Counts:**
**(if Applicable)**

☒ It is further ordered that the sentence imposed for count(s) 2 shall run (check one)

☒ consecutive to ☐ concurrent with the sentence set forth in count 1 of this case.

**Consecutive/ Concurrent As To Other Sentences:**
**(if Applicable)**

It is further ordered that the composite term of all sentences imposed for the counts specified in this order shall run (check one) ☐ consecutive to ☐ concurrent with the following: (check one)

☐ any active sentence being served.
☐ specific sentences: _____

**Retention of Jurisdiction:**

☐ The court retains jurisdiction over the defendant pursuant to section 947.16(4), Florida Statutes.

DONALD JAMES SMITH, DEFENDANT

CASE NUMBER:16-2013-CF-005781-AXXX-MA
OBTS # _____

## OTHER PROVISIONS

(As to Count(s) 3 )

**Current Jail Credit Time:**

☒ It is further ordered that the defendant shall be allowed a total of 1775 days as credit for time incarcerated on this case / count before imposition of this sentence.

**Credit for Time Served on Violation of Probation / Community Control:**
**(check one)**

☐ It is further ordered that the defendant shall be allowed _____ days time served between date of arrest as a violator following release from prison to the date of resentencing. The Department of Corrections shall apply original jail time credit and shall compute and apply credit for time served only pursuant to section 921.0017, Florida Statutes, on count(s) _____. (Offenses committed on or after January 1, 1994.)

☐ It is further ordered that the defendant be allowed _____days time served between date of arrest as a violator following release from prison to the date of resentencing. The Department of Corrections shall apply original jail time credit and shall compute and apply credit for time served and unforfeited gain time previously awarded on count(s)_____. (Offenses committed before October 1, 1989.)

☐ It is further ordered that the defendant be allowed _____ days time served between date of arrest as a violator following release from prison to the date of resentencing. The Department of Corrections shall apply original jail time credit and shall compute and apply credit for time served on count(s) _____. (Offenses committed between October 1, 1989, and December 31, 1993.)

**Prior Prison Credit:**

☐ It is further ordered that the defendant shall be allowed _____ days time served between date of the original sentence being vacated to the date of resentencing. The Department of Corrections shall apply original jail time credit and shall compute and apply credit for time served on count(s) _____.

**Forfeiture of Prior Gain/Good Time:**
**(check one)**

☐The court deems the unforfeited gain time previously awarded on the above count(s) forfeited under section 948.06(7)

**OR**

☐ The court allows unforfeited gain time previously awarded on the above count(s).
(Gain time may be subject to forfeiture by the Department of Corrections under section 944.28(1))

**Consecutive/ Concurrent As to Other Counts:**
**(if Applicable)**

☒ It is further ordered that the sentence imposed for count(s) 3 shall run (check one)

☒ consecutive to ☐ concurrent with the sentence set forth in count 2 of this case.

**Consecutive/ Concurrent As To Other Sentences:**
**(If Applicable)**

It is further ordered that the composite term of all sentences imposed for the counts specified in this order shall run (check one) ☐ consecutive to ☐ concurrent with the following: (check one)

☐ any active sentence being served.
☐ specific sentences: _____

**Retention of Jurisdiction:**

☐ The court retains jurisdiction over the defendant pursuant to section 947.16(4), Florida Statutes.

DONALD JAMES SMITH, DEFENDANT CASE NUMBER:16-2013-CF-005781-AXXX-MA

## SPECIAL PROVISIONS

(As to Count(s) 2 & 3 )

By appropriate notation, the following provisions apply to the sentence imposed:

☐ **Firearm:** It is further ordered that the _____mandatory minimum imprisonment provisions of section 775.087(2)(a), Florida Statutes, is hereby imposed for the sentence specified in this count.

☐ **Drug Trafficking:** It is further ordered that the _____ mandatory minimum imprisonment provision and a fine of $_____, as set forth in section 893.135(1), Florida Statutes, is hereby imposed for the sentence specified in this count.

☐ **Controlled Substance Within 1,000 Feet of School:** It is further ordered that the 3-year mandatory minimum imprisonment provision of section 893.13(1)(c)1, Florida Statutes, is hereby imposed for the sentence specified in this count.

☐ **Habitual Felony Offender:** The defendant is adjudicated a habitual felony offender and has been sentenced to an extended term in accordance with the provisions of section 775.084(4)(a), Florida Statutes. The requisite findings by the court are set forth in a separate order or stated on the record in open court.

☐ **Habitual Violent Felony Offender:** The defendant is adjudicated a habitual violent felony offender and has been sentenced to an extended term in accordance with the provisions of section 775.084(4)(b), Florida Statutes. A mandatory minimum term of_____ year(s) must be served prior to release. The requisite findings of the court are set forth in a separate order or stated on the record in open court.

☐ **Violent Career Criminal:** The defendant is adjudicated a violent career criminal and has been sentenced to an extended term in accordance with the provisions of section 775.084(4)(d), Florida Statutes. A mandatory minimum term of _____ year(s) must be served prior to release. The requisite findings of the court are set forth in a separate order or stated on the record in open court.

☐ **Prison Release Reoffender:** The defendant is adjudicated a prison release reoffender in accordance with the provisions of section 775.082(9), and is sentenced to serve 100 percent of the maximum sentence provided by law for the offense of which the defendant has been convicted. A mandatory minimum term of _____ year(s) imposed as PRR in accordance with the provisions of this section.

☐ **Law Enforcement Protection Act:** It is further ordered that the defendant shall serve a minimum of _____ year(s) before release in accordance with section 775.0823, Florida Statutes (offenses committed before January 1, 1994).

☐ **Capital Offense (Excluding First Degree Murder and s. 790.161):** It is further ordered that the defendant shall serve no less than 25 years in accordance with the provisions of section 775.082(1), Florida Statutes (offenses committed before October 1, 1995).

☐ **Short-Barreled Rifle, Shotgun, Machine Gun:** It is further ordered that the 5-year mandatory minimum provisions of section 790.221(2), Florida Statutes, are hereby imposed for the sentence specified in this count (offenses committed before January 1, 1994).

☐ **Continuing Criminal Enterprise:** It is further ordered that the 25-year mandatory minimum sentence provisions of section 893.20, Florida Statutes, are hereby imposed for the sentence specified in this count (offenses committed before January 1, 1994).

☐ **DUI Manslaughter:** It is further ordered that the 4 year mandatory minimum sentence provision pursuant to section 316.193(3)(c)3, Florida Statutes, is hereby imposed for the sentence specified in this count.

☐ **Dangerous Sexual Felony Offender:** The defendant is adjudicated a dangerous sexual felony offender and has been sentenced to an extended term in accordance with the provisions of section 794.0115, Florida Statutes. A mandatory minimum term of _____ year(s) must be served. The requisite findings of the court are set forth in a separate order or stated on the record in open court.

☐ **Criminal Gang Activity:** The felony conviction is for an offense that was found, pursuant to section 874.04, Florida Statutes, to have been committed for the purpose of benefiting, promoting or furthering the interests of a criminal gang.

☐ **Sexual Offender:** The defendant is adjudicated a Sexual Offender in accordance with the provisions of section 943.0435(1)(a) , Florida Statutes.

☒ **Sexual Predator:** The defendant is adjudicated a Sexual Predator in accordance with the provisions of section 775.21(4)(a), Florida Statutes.

☐ **Youthful Offender:** The defendant is adjudicated a Youthful Offender in accordance with the provisions of section 958.04(1)(a), Florida Statutes.

☐ **Taking a Law Enforcement Officer's Firearm:** It is further ordered that the 3- year mandatory minimum imprisonment provision of section 775.0875(1), Florida Statutes, is hereby imposed for the sentence specified in this count (offenses committed before January 1, 1994).

DONALD JAMES SMITH, DEFENDANT

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In the event the defendant is sentenced to a period of incarceration in state prison, the Sheriff of Duval County, Florida, is hereby ordered and directed to deliver the defendant to the Florida Department of Corrections at the facility designated by the Department together with a copy of this judgment and sentence and any other documents specified by Florida Statute.

In open court, the defendant was advised of the right to appeal from this sentence by filing a notice of appeal with the clerk of this court within 30 days from this date and the right to the assistance of counsel in taking the appeal at the expense of the State on showing of indigency.

In imposing the above sentence, the court further recommends / adjudges:

DONE AND ORDERED in open court in Jacksonville, Duval County, Florida, this 2nd day of May, 2018.

Judge