INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS: A LIFELINE FOR DEFENDANTS WITH MENTAL HEALTH ISSUES THAT ARE SENTENCED TO DEATH IN OHIO AND FLORIDA.

By Madelyn Smith

I. Introduction

The Sixth Amendment of the U.S. Constitution guarantees a criminal defendant the right to counsel,[1] and "[i]t has long been recognized that the right to counsel is the right to the effective assistance of counsel."[2] The Due Process Clause of the Fourteenth Amendment guarantees a criminal defendant this right on the appellate level.[3]

> The standards set out by the United States Supreme Court by which to measure ineffective assistance of counsel under the Sixth Amendment and ineffective assistance of appellate counsel under the Fourteenth Amendment apply to criminal defense representation in federal court *and* in every state court as well since the United States Constitution is the "supreme" law of the land pursuant to the federal Constitution's Supremacy Clause.[4]

However, should a proper state court "find that its own state constitution requires utilization of a 'higher' standard of performance to constitute the effective assistance of counsel, such a higher standard would remain in effect in that state and, despite its divergence from the federal constitutional standard, it would not offend the federal Constitution."[5]

The most common ineffective assistance of counsel claim capital defendants make is that trial counsel "was ineffective in investigating and presenting mitigating evidence."[6] In

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1 Yarborough v. Gentry, 540 U.S. 1, 5 (2003).

2 McMann v. Richardson, 397 U.S. 759, 771, n.14 (1970); *see also* Reece v. Georgia, 350 U.S. 85, 90 (1955); Glasser v. United States, 315 U.S. 60, 69-70 (1942); Avery v. Alabama, 308 U.S. 444, 446 (1940); Powell v. Alabama, 287 U.S. 45, 57 (1932).

3 *See* Evitts v. Lucey, 469 U.S. 387, 396 (1985).

4 JOHN M. BURKOFF & NANCY M. BURKOFF, INEFFECTIVE ASSISTANCE OF COUNSEL § 2:1 (Thomson Reuters ed., 2013) (citations omitted), *available at* Westlaw INASCNSL.

5 *Id.*

6 BARRY LATZER & DAVID MCCORD, DEATH PENALTY CASES: LEADING U.S. SUPREME COURT CASES ON CAPITAL PUNISHMENT 317 (Pamela Chester & Gregory Chalson eds., 3d ed. 2011); *cf.*

Strickland v. Washington, the Supreme Court established the standard for assessing the effectiveness of counsel with a two-prong test.[7] "First, the defendant must show that counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense."[8] The Court stated that "[t]he proper measure of attorney performance . . . [is] reasonableness under prevailing professional norms," and noted that the "[p]revailing norms of practice as reflected in American Bar Association standards and the like are guides to determining what is reasonable," but, the Court emphasized, "they are only guides."[9] Thus, defense counsel's duties are not outlined into "detailed prescriptions for legal representation of capital defendants."[10] Rather, "while States are free to impose whatever specific rules they see fit to ensure that criminal defendants are well represented," the Sixth Amendment imposes one general requirement that each state must follow: "that counsel make objectively reasonable choices."[11]

To demonstrate prejudice, the Court held that "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[12] However, prejudice is challenging for defendants to demonstrate because "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

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Strickland v. Washington, 466 U.S. 668, 695 (1984) ("When a defendant challenges a death sentence . . . the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.").

7 Strickland v. Washington, 466 U.S. 668, 687 (1984).

8 *Id.*

9 *Id.* at 688 (citations omitted).

10 Bobby v. Van Hook, 558 U.S. 4, 8 (2009).

11 Roe v. Flores-Ortega, 528 U.S. 470, 479 (2000); *see also id.* at 9.

12 *Strickland*, 466 U.S. at 694.

strategy."[13] In *United States v. Cronic*, the Court carved out a narrow exception to this presumption of effectiveness, holding that if the defendant can show that "counsel entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable."[14] To illustrate, constitutional error has uniformly been found without any showing of prejudice "when counsel was totally absent, was prevented from assisting the accused during a critical stage of the proceeding, or had a conflict of interest that affected the adequacy of representation."[15]

This paper features select Florida and Ohio death penalty cases that involve claims of ineffective assistance of counsel: specifically, claims brought against trial counsel for failure to adequately investigate, develop, and present mitigating evidence. Florida and Ohio were selected as jurisdictions because each state mandates the death sentencing court to author an opinion carefully documenting its specific findings as to the aggravating and mitigating factors upon which its decision is based.[16] Consequently, these jurisdictions have generated comprehensive pools of case law providing detailed analyses of ineffective assistance of counsel claims. The cases featured in this paper were selected because they reflect the state of the law in their respective jurisdictions, particularly highlighting the state courts' applications of the *Strickland* and *Cronic* standards and divergences therefrom. *Coleman v. State* provides a list of mitigation factors that Florida considers significant and points out that trial counsel's duty to investigate can

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13 *Id.* at 689 (internal quotation mark omitted).
14 United States v. Cronic, 466 U.S. 648, 659 (1984).
15 Chavez v. State, 12 So. 3d 199, 211 (Fla. 2009); *see also, e.g., id.* at 659 n.25.
16 *See* FLA. STAT. ANN. § 921.141(3) (West 2013); OHIO REV. CODE ANN. § 2929.03(F) (West 2013).

be affected by the defendant's conduct.[17] *Simmons v. State* reveals that although Florida considers the heinous, atrocious, or cruel aggravating factor to be especially weighty, mental health mitigation is a formidable counterweight to it.[18] *Simmons* also articulates the importance of advising clients about the advantages and disadvantages of presenting mitigation evidence.[19] *State v. Herring* accentuates Ohio's reliance on the American Bar Association's guidelines for the appointment and performance of trial Counsel in death penalty cases for guidance.[20] *Herring* also points out that it is trial counsel's duty to make sure the mitigating expert properly completes his or her investigation.[21] *State v. Perez* reveals that counsel may concede its client's guilt to the jury and still be found effective if its decision to concede guilt was reasonably strategic.[22] *Perez* also underscores the notion that a court cannot infer a defense failure from a silent record.[23] The scope of the paper was narrowed to state court decisions, rather than also including federal appeal proceedings, for purposes of comparison and concision.

II. Florida Common Law, Statutes, and Procedural Rules Relevant to Ineffective Assistance of Counsel Claims for Failure to Adequately Investigate, Develop, and Present Mitigating Evidence

The Florida Supreme Court has recognized that "[c]riminal defendants are guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution . . . and article I, section 16 of the Florida Constitution,"[24] and it has expressly adopted the *Strickland* standard for assessing ineffective assistance of counsel claims in capital

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17 Coleman v. State, 64 So. 3d 1210, 1222, 1224-25 (Fla. 2011).
18 Simmons v. State, 105 So. 3d 475, 506-08 (Fla. 2012).
19 *Id.* at 508.
20 State v. Herring, No. 08-MA-213, 2011 WL 497765, at *10 (Ohio Ct. App. 2011).
21 *Id.* at *11.
22 State v. Perez, 920 N.E.2d 104, 136 (Ohio 2009).
23 *Id.* at 139.
24 Pub. Defender, Eleventh Judicial Circuit of Fla. v. State, 115 So. 3d 261, 266-67 (Fla. 2013) (citation omitted).

cases.[25] In Florida, after a defendant has been convicted or adjudicated guilty of a capital felony,[26] the court conducts "a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment."[27] Ineffective assistance of counsel claims for failure to present mitigating evidence almost always originate from the penalty phase of trial in Florida because it is when aggravating and mitigating circumstances are weighed.[28]

"In order to impose a death penalty, [the trial court] must find that sufficient statutorily-defined aggravating circumstances exist to justify the death penalty"[29] and that insufficient statutorily-defined and nonstatutorily-defined mitigating circumstances exist to outweigh the aggravating circumstances found to exist.[30] "The only matters that may be considered in aggravation are those set out in the death penalty statute."[31] While Florida's death penalty statute rigidly limits the presentation of aggravating circumstances at the sentencing phase of trial to

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[25] *E.g.*, Conde v. State, 35 So. 3d 660, 663 (Fla. 2010).

[26] *See generally* 15B Fla. Jur. 2d *Criminal Law—Procedure* § 2538 ("There is a difference in Florida between a capital felony in name and a capital felony in fact. The Florida Supreme Court has defined a capital felony to be one where the maximum possible punishment is death," Rusaw v. State, 451 So. 2d 469 (Fla. 1984). "Presently, the only such crime in Florida is first-degree murder, premeditated or felony," State v. Boatwright, 559 So. 2d 210 (Fla. 1990); Rowe v. State, 417 So. 2d 981 (Fla. 1982)).

[27] FLA. STAT. ANN. § 921.141 (West 2013).

[28] *See, e.g.*, Occhicone v. State, 768 So. 2d 1037, 1049 (Fla. 2000) ("In order to obtain a reversal of [a] death sentence on the ground of ineffective assistance of counsel at the *penalty phase*, [a defendant] must show both (1) that the identified acts or omissions of counsel were deficient, or outside the wide range of professionally competent assistance, and (2) that the deficient performance prejudiced the defense such that, without the errors, there is a reasonable probability that *the balance of aggravating and mitigating circumstances* would have been different." (emphasis added) (internal quotation mark omitted)).

[29] Spinkellink v. Wainwright, 578 F.2d 582, 588 (5th Cir. 1978).

[30] § 921.141(3).

[31] Zack v. State, 911 So. 2d 1190, 1208 (Fla. 2005); *see also* Winkles v. State, 894 So. 2d 842, 846 (Fla. 2005) ("As we have said before, [t]he aggravating factors to be considered in determining the propriety of a death sentence are limited to those set out in [the statute]." (alterations in original) (quoting Vining v. State, 637 So. 2d 921, 927 (Fla. 1994)) (internal quotation mark omitted)).

those listed therein,[32] it allows for a more flexible approach in the consideration of admissibility for mitigating circumstances by providing—in addition to seven explicitly identified types of mitigating circumstances—a seemingly "catch-all" provision.[33] The provision provides that "the

[32] § 921.141(5) ("Aggravating circumstances shall be limited to the following: (a) The capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or on felony probation. (b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person. (c) The defendant knowingly created a great risk of death to many persons. (d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any: robbery; sexual battery; aggravated child abuse; abuse of an elderly person or disabled adult resulting in great bodily harm, permanent disability, or permanent disfigurement; arson; burglary; kidnapping; aircraft piracy; or unlawful throwing, placing, or discharging of a destructive device or bomb. (e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody. (f) The capital felony was committed for pecuniary gain. (g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws. (h) The capital felony was especially heinous, atrocious, or cruel. (i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. (j) The victim of the capital felony was a law enforcement officer engaged in the performance of his or her official duties. (k) The victim of the capital felony was an elected or appointed public official engaged in the performance of his or her official duties if the motive for the capital felony was related, in whole or in part, to the victim's official capacity. (l) The victim of the capital felony was a person less than 12 years of age. (m) The victim of the capital felony was particularly vulnerable due to advanced age or disability, or because the defendant stood in a position of familial or custodial authority over the victim. (n) The capital felony was committed by a criminal gang member, as defined in s. 874.03. (o) The capital felony was committed by a person designated as a sexual predator pursuant to s. 775.21 or a person previously designated as a sexual predator who had the sexual predator designation removed. (p) The capital felony was committed by a person subject to an injunction issued pursuant to s. 741.30 or s. 784.046, or a foreign protection order accorded full faith and credit pursuant to s. 741.315, and was committed against the petitioner who obtained the injunction or protection order or any spouse, child, sibling, or parent of the petitioner.").

[33] *Id.* § 921.141(6) ("Mitigating circumstances shall be the following: (a) The defendant has no significant history of prior criminal activity. (b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance. (c) The victim was a participant in the defendant's conduct or consented to the act. (d) The defendant was an accomplice in the capital felony committed by another person and his or her participation was relatively minor. (e) The defendant acted under extreme duress or under the substantial domination of another person. (f) The capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired. (g) The age of the defendant at the time of the crime. (h) The existence of any other

existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty" must be considered a mitigating circumstance for the purposes of the statute.[34] The Florida Supreme Court has held that "[a] mitigating circumstance is any aspect of a defendant's character or record and any of the circumstances of the offense that reasonably may serve as a basis for imposing a sentence less than death."[35] This catch-all provision provides defendants the opportunity to present evidence that may "ameliorate the enormity of [their] guilt,"[36] provided the evidence is relevant,[37] and is consistent with the U.S. Constitution's Eighth Amendment requirement that "any aspect of defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death" must be considered by courts as a mitigating factor.[38] Consequently, the broad nature of considerable mitigating evidence provides defense attorneys with a multitude of strategic avenues, while simultaneously providing defendants with significant material from which to form ineffective assistance of counsel claims.[39]

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factors in the defendant's background that would mitigate against imposition of the death penalty.").

[34] *Id.* § 921.141(6)(h).

[35] Douglas v. State, 878 So. 2d 1246, 1258 (Fla. 2004) (internal quotation mark omitted); *see also* Peek v. State, 395 So. 2d 492, 497 (Fla. 1980) ("Our death penalty statute does not limit consideration of mitigating circumstances to those statutorily enumerated.").

[36] 15B Fla. Jur. 2d, *supra* note 26, § 2590; *accord* Lucas v. State, 568 So. 2d 18, 23 (Fla. 1990); Eutzy v. State, 458 So. 2d 755, 759 (Fla. 1984).

[37] *See* § 921.141(1).

[38] Locket v. Ohio, 438 U.S. 586, 604 (1978).

[39] *See* 15B Fla. Jur. 2d, *supra* note 26, § 2608 ("[U]nlike statutory mitigation that has been clearly defined by the legislature, nonstatutory mitigation may consist of any factor that could reasonably bear on the sentence. The parameters of nonstautory mitigation are largely undefined. . . . Because each case is unique, determining what evidence might mitigate each individual defendant's sentence must remain within the trial court's discretion." (citations omitted)). *Compare id.* § 2591 (providing examples of impermissible mitigating circumstances), *with id.* §§ 2609-21 (providing examples of particular nonstatutory mitigating circumstances).

After hearing the evidence, the jury deliberates and renders an advisory sentence based on their finding of whether sufficient mitigating circumstances exist that outweigh the aggravating circumstances found to exist.[40] Notwithstanding the advisory sentence recommended by the jury, the court must conduct its own weighing of the aggravating and mitigating circumstances.[41] If the court finds the death penalty to be appropriate, its determination must be "supported by specific written findings of fact" based upon the aggravating and mitigating circumstances, the records of the trial, and the records of the sentencing proceeding.[42] The court has "articulated the requirements with regard to the manner in which a trial court must weigh aggravating circumstances against mitigating circumstances in its written sentencing order."[43]

While states are required to consider relevant nonstatutory mitigating circumstances, courts are granted discretion on how much weight to assign a factor. In fact, the Florida Supreme Court has repeatedly recognized that "even where a mitigating circumstance is found [sic] a trial court may give it no weight when that circumstance is not mitigating based on the unique facts of the case."[44] Therefore, in order for an attorney

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40 § 921.141(2).

41 *Id.* § 921.141(3).

42 *Id.*

43 Oyola v. State, 99 So. 3d 431, 446 (Fla. 2012) ([W]hen addressing mitigating circumstances, a trial court must "expressly evaluate" the mitigating circumstances that the defendant has proposed and determine whether evidence supports them. In cases of nonstatutory mitigators, trial courts must determine whether those mitigators are "truly of a mitigating nature." A trial court must then weigh the aggravating circumstances against the mitigating circumstances. To enable proper appellate review, a sentencing order must expressly consider each proposed mitigating circumstance, determine if the circumstance exists, and, if the circumstance does exist, what weight to allocate it." (internal citations omitted)).

44 *E.g.*, Ault v. State, 53 So. 3d 175, 186 (Fla. 2010) (quoting Coday v. State, 946 So. 2d 988, 1003 (Fla. 2006) (internal quotation mark omitted)).

to perform effectively, adequate investigation into mitigating factors is crucial: particularly investigation into factors that will likely be given major weight in the case.[45]

Florida has taken efforts to curtail the number of incompetent counsel representing capital defendants by establishing minimum standards for attorneys in capital cases.[46] The Florida Rules of Criminal Procedure lists numerous requirements for capital counsel and states that "[c]ounsel in death penalty cases should be required to perform at the level of an attorney reasonably skilled in the specialized practice of capital representation, zealously committed to the capital case, who has had adequate time and resources for preparation."[47] While the establishment of minimum standards for attorney's acting as counsel in capital cases is evidence of Florida's recognition of the danger to justice ineffective assistance of counsel in death penalty cases creates, these standards by no means abolish ineffective assistance of counsel claims.

III. In Comparison: Ohio Common Law, Statutes, and Procedural Rules Relevant to Ineffective Assistance of Counsel Claims for Failure to Adequately Investigate, Develop, and Present Mitigating Evidence

Ohio courts have repeatedly recognized a defendant's Sixth Amendment right to effective counsel,[48] and, as in *Strickland*, "a properly licensed attorney practicing in [Ohio] is [generally]

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45 *See* Douglas v. State, 878 So. 2d 1246, 1257 (Fla. 2004) (holding that a "trial court may find that an established mitigating factor is entitled to no weight for reasons or circumstances unique to the case"); *cf.* Bogle v. State, 655 So. 2d 1103, 1109 (Fla. 1995) (holding that although trial judge did not "specifically list [defendant's] artistic talent and capacity for employment in mitigation," this did not constitute reversible error "given the minor weight that would be afforded to those factors"); Robinson v. State, 95 So. 3d 171, 183 (Fla. 2012) (holding that trial counsel's failure to present mitigating evidence concerning defendant's background to the trial judge during a *Spencer*-like proceeding, resulting in the trial judge overriding the jury's life-sentence recommendation and imposing a death sentence, prejudiced the defendant).

46 FLA. R. CRIM. P. 3.112.

47 *Id.*

48 *E.g.*, State v. Creech, 936 N.E.2d 79, 91 (Ohio Ct. App. 2010).

presumed to be competent."[49] The Supreme Court of Ohio has set forth the test for determining "whether the accused has been denied his right to effective assistance of counsel, which is whether the accused, under all the circumstances, had a fair trial and whether substantial justice was done."[50] However, the Supreme Court of Ohio has consistently held that in making this determination, the *Strickland* standard for assessing ineffective assistance of counsel claims should be employed.[51] Thus, Ohio's individual state standard does not distinguish itself from the federal standard.

Unlike Florida, where the determination of aggravating circumstances is made during the sentencing phase of a capital trial, the presence of aggravating circumstances is determined in the guilt phase of a capital trial in Ohio.[52] Also in Ohio, "the imposition of the death penalty requires that one of ten specific statutory factors is laid out in the indictment and proven beyond a reasonable doubt at trial."[53] After guilty verdicts are returned on both the charge of aggravated murder and one or more of the aggravating circumstance specifications,[54] the trial proceeds to

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[49] State v. Blair, 872 N.E.2d 986, 989 (Ohio Ct. App. 2007) (citing State v. Lytle, 358 N.E.2d 623, 627 (Ohio 1976)).

[50] *Id.* (citing State v. Hester, 341 N.E.2d 304, 310 (Ohio 1976)).

[51] *See, e.g.*, State v. Bradley, 538 N.E.2d 373, 375 (Ohio 1989).

[52] OHIO REV. CODE ANN. § 2929.03(C)(2)(a)(i) (West 2013).

[53] State v. Herring, No. 08-MA-213, 2011 WL 497765, at *4 (Ohio Ct. App. 2011) (citing *id.* § 2929.04(A)).

[54] § 2929.04(A) (Aggravating specifications for death eligibility are as follows: "(1) The offense was the assassination of the president of the United States or a person in line of succession to the presidency, the governor or lieutenant governor of this state, the president-elect or vice president-elect of the United States, the governor-elect or lieutenant governor-elect of this state, or a candidate for any of the offices described in this division. For purposes of this division, a person is a candidate if the person has been nominated for election according to law, if the person has filed a petition or petitions according to law to have the person's name placed on the ballot in a primary or general election, or if the person campaigns as a write-in candidate in a primary or general election. (2) The offense was committed for hire. (3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender. (4) The offense was committed while the offender was under detention or while the offender was at large after having broken detention. As used in division

the sentencing phase.[55] Consistent with the Eighth Amendment of the U.S. Constitution,[56] the defendant is "given great latitude in the presentation of evidence of the mitigating factors set forth in [the state death penalty statute], and of any other factors in mitigation of the imposition of the sentence of death."[57] Like Florida, Ohio's death penalty statute contains a catch-all

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(A)(4) of this section, "detention" has the same meaning as in section 2921.01 of the Revised Code, except that detention does not include hospitalization, institutionalization, or confinement in a mental health facility or mental retardation and developmentally disabled facility unless at the time of the commission of the offense either of the following circumstances apply: (a) The offender was in the facility as a result of being charged with a violation of a section of the Revised Code. (b) The offender was under detention as a result of being convicted of or pleading guilty to a violation of a section of the Revised Code. (5) Prior to the offense at bar, the offender was convicted of an offense an essential element of which was the purposeful killing of or attempt to kill another, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender. (6) The victim of the offense was a law enforcement officer, as defined in section 2911.01 of the Revised Code, whom the offender had reasonable cause to know or knew to be a law enforcement officer as so defined, and either the victim, at the time of the commission of the offense, was engaged in the victim's duties, or it was the offender's specific purpose to kill a law enforcement officer as so defined. (7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary, and either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design. (8) The victim of the aggravated murder was a witness to an offense who was purposely killed to prevent the victim's testimony in any criminal proceeding and the aggravated murder was not committed during the commission, attempted commission, or flight immediately after the commission or attempted commission of the offense to which the victim was a witness, or the victim of the aggravated murder was a witness to an offense and was purposely killed in retaliation for the victim's testimony in any criminal proceeding. (9) The offender, in the commission of the offense, purposefully caused the death of another who was under thirteen years of age at the time of the commission of the offense, and either the offender was the principal offender in the commission of the offense or, if not the principal offender, committed the offense with prior calculation and design. (10) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit terrorism.").

[55] If the defendant waived their right to trial by jury, the sentence is decided by the panel of three judges from the guilt phase of the trial; if not, the trial jury and trial judge will determine it. *Id.* § 2929.03(C)(2)(b).

[56] U.S. CONST. amend. VII.

[57] § 2929.03(D)(1); *see id.* § 2929.04(B) (The court, trial jury, or three-judge panel must consider and weigh against any aggravating circumstances "the nature and circumstances of the offense, the history, character, and background of the offender, and all of the following factors:

provision,[58] which the Supreme Court of Ohio has given notable weight.[59] Also like Florida, the defendant has the burden of providing evidence of any factors that mitigate the imposition of a death sentence.[60] The prosecution must prove beyond a reasonable doubt "that the aggravating circumstances the defendant was found guilty of committing are sufficient to outweigh the factors in mitigation of the imposition of the sentence of death."[61] Like Florida, the jury conducts a balancing test, weighing the aggravating circumstances against the mitigating ones, upon which they make a sentence recommendation to the trial judge, who after conducting the same balancing test, either rejects or imposes it.[62] Unlike Florida, however, an Ohio trial judge may not override a jury's recommendation of life in prison and impose a death sentence.[63] Similarly to Florida, the Ohio court must construct a written opinion containing the court's specific findings as to the aggravating circumstances and mitigating factors upon which it based its decision.[64] This detailed record is vital to courts' decisions in subsequent ineffective assistance

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(1) Whether the victim of the offense induced or facilitated it; (2) Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation; (3) Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of the offender's conduct or to conform the offender's conduct to the requirements of the law; (4) The youth of the offender; (5) The offender's lack of a significant history of prior criminal convictions and delinquency adjudications; (6) If the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim; (7) Any other factors that are relevant to the issue of whether the offender should be sentenced to death.").

58 *Id.* § 2929.04(B)(7).

59 *See* State v. Hand, 840 N.E.2d 151, 194 (Ohio 2006) ("We also give weight to mitigating factors under R.C. 2929.04(B)(7). This evidence includes Hand's long work history, his honorable military service, his work as a Scoutmaster, and Robert's testimony that Hand has been a supporting and loving father. We also give some weight to evidence that Hand will adapt well to prison.").

60 § 2929.03(D)(1).

61 *Id.*

62 *Id.* § 2929.03(D)(3).

63 *Id.* § 2929.03(D).

64 *Id.* § 2929.03(F).

of counsel proceedings because "[i]n any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all circumstances," and "[m]uch of this information is highly relevant in considering the statutory mitigating factors."[65]

Like Florida, Ohio has implemented minimum qualifications counsel must meet to represent a defendant in a death penalty cases, and also like Florida, Ohio's rules emphasize that counsel must demonstrate that it can dedicate sufficient time to the case.[66] The emphasis on counsel's time commitment is a preemptive effort by the states to ensure counsel has enough time to conduct a proper mitigation investigation.

The main difference between Florida and Ohio's death penalty statutes in respect to aggravating and mitigating circumstances is that in Ohio, the prosecution must prove beyond a reasonable doubt that an aggravating factor exists in the guilt phase of the trial. Only then will the crime be death eligible. If the crime is found to be death eligible, the prosecution must then in the penalty phase prove beyond a reasonable doubt that the aggravating factors previously found to exist outweigh the mitigating circumstances. In Florida, on the other hand, the capital felony of premeditated or felony first-degree murder is automatically death eligible. It follows to reason that Florida capital defense attorneys generally know going into trial that if their client is found guilty, they must be prepared to present mitigating evidence at the subsequent death sentencing proceeding. In contrast, Ohio attorneys must be prepared for a variety of options since their client's conviction does not automatically render a death sentencing proceeding. However, this difference should have little effect on the assessment of attorney reasonableness in an ineffective assistance of counsel claim since the Supreme Court has repeatedly held that "[i]t is

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65 State v. Herring, No. 08-MA-213, 2011 WL 497765, at *7 (Ohio Ct. App. 2011).
66 OHIO SUP. R. 20.

unquestioned that under the prevailing professional norms . . . counsel had an obligation to conduct a thorough investigation of the defendant's background."[67]

IV. Florida Ineffective Assistance of Counsel Cases

A. *Coleman v. State*

Michael Coleman was convicted of four counts of first-degree murder for the murders of Derek Hill, Morris Douglas, Michael McCormick, and Mildred Baker.[68] He was also convicted of the attempted first-degree murder of Amanda Merrell.[69] The convictions stemmed from the following criminal conduct: Coleman was a member of the "Miami Boys" drug organization.[70] Late in the evening of September 19, 1988, Coleman and several other members of the Miami Boys pushed their way into the apartment of decedents Hill and Douglas to retrieve a safe that Hill and Douglas had stolen from Pensacola Miami Boys member Michael McCormick.[71] Coleman and his accomplices demanded Hill and Douglas, and their visitors, Darlene Crenshaw and Amanda Merrell, to strip off their clothes and remove their jewelry.[72] After which, they bound them with electrical cords.[73] One of Coleman's accomplices located McCormick's girlfriend, Mildred Baker, and brought her to Douglas and Hill's apartment.[74] Coleman and his accomplices then sexually assaulted Merrell and Baker.[75] Crenshaw escaped after giving drugs and money to Coleman and his accomplices.[76] Coleman and his accomplices then slashed and

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67 Porter v. McCollum, 558 U.S. 30, 39 (2009) (quoting Williams v. Taylor, 529 U.S. 362, 396 (2000)) (internal quotation mark omitted).
68 Coleman v. State, 64 So. 3d 1210, 1213 (Fla. 2011).
69 *Id.*
70 *Id.* (citing Coleman v. State, 610 So. 2d 1283, 1284-85 (1992)).
71 *Id.* (citing 610 So. 2d at 1284-85).
72 *Id.* (citing 610 So. 2d at 1284-85).
73 *Id.* (citing 610 So. 2d at 1284-85).
74 *Id.* (citing 610 So. 2d at 1284-85).
75 *Id.* (citing 610 So. 2d at 1284-85).
76 *Id.* (citing 610 So. 2d at 1284-85).

shot the remaining five prisoners.[77] "Despite having her throat slashed three times and having been shot in the head, Merrell freed herself and summoned the authorities. The four other victims were dead at the scene."[78]

The jury recommended a life sentence, but the trial court overrode the recommendation and imposed four death sentences.[79] The court based its decision on its finding of five aggravating circumstances[80] and one non-statutory mitigating circumstance.[81] It concluded "that the jury's recommendation could have been based only on minor, non-statutory mitigating circumstances or sympathy," which is unreasonable.[82] On direct appeal, the Florida Supreme Court "struck the avoid or prevent lawful arrest aggravator after finding the evidence insufficient to support it, but found that the other four factors were supported by the record," and "that the trial court's override was proper . . . because of the lack of mitigation presented in the case."[83] The circuit court denied Coleman's postconviction relief motion to vacate his convictions of first-degree murder and sentence of death.[84] Coleman appealed the circuit court's order and filed

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77 *Id.* (citing 610 So. 2d at 1284-85).

78 *Id.* (quoting 610 So. 2d at 1284-85).

79 *Id.*

80 *Id.* at 1214 n.2 ("The trial court found the existence of the following aggravating circumstances: (1) the defendant was previously convicted of a another capital felony or a felony involving the use or threat of force; (2) the capital felonies were committed while the defendant was engaged in the commission of a robbery, sexual battery, burglary, and kidnapping; (3) the capital felony was committed for the purpose of avoiding or preventing a lawful arrest; (4) the capital felony was especially heinous, atrocious, and cruel (HAC); and (5) the murders were committed in a cold, calculated, and premeditated (CCP) manner." (citing 610 So. 2d at 1287)).

81 *Id.* at 1214 n.3 ("The trial court found that the defendant has maintained close family ties throughout his life and has been supportive of his mother." (quoting 610 So. 2d at 1287)).

82 *Id.* at 1214 (quoting 610 So. 2d at 1287) (internal quotation mark omitted); *see* California v. Brown, 479 U.S. 538, 542-43 (1987) (holding that jury instruction instructing jury not to be swayed by "mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling" was proper because it limited "the jury's sentencing considerations to record evidence," which helps safeguard the reliability of the sentencing process).

83 *Coleman*, 64 So. 3d at 1214 (quoting 610 So. 2d at 1287).

84 *Id.* at 1212.

petitions for a writ of habeas corpus, contending, among other things, that his trial counsel, Ted Stokes, failed to provide effective assistance of counsel during the penalty phase of trial because he "failed to investigate, develop, and present available mitigating evidence that would have legally precluded an override of the jury's life recommendation."[85]

In reviewing an ineffective assistance of counsel claim, the court defers to the "circuit court's factual findings that are supported by competent, substantial evidence."[86] The court observed that at the postconviction evidentiary hearing, Coleman's "postconviction counsel called three witnesses to testify regarding mitigation that Stokes allegedly failed to uncover, develop, and present during the penalty phase": Marie Wims, Coleman's maternal aunt; Dolly Leverson, Coleman's mother; and Dr. Jethro Toomer.[87] The court found that the mitigation evidence Coleman's postconviction counsel presented was substantial and revealed the following:

> Coleman (1) came from an impoverished background, (2) had an unstable childhood, (3) had a poor relationship with his father, (4) underwent a traumatic experience when he lost his father at a young age, (5) was traumatized by the loss of his half-brother, (6) suffered from negative experiences, such as riots and violence, at a young age, (7) has an erratic school record and history of special education placement, (8) has a long history of substance abuse from a young age, (9) was molested as a child, (10) suffered a severe head injury at the age of eighteen, and (11) suffers from mental health illness and deficiencies.[88]

Stokes also testified at the postconviction evidentiary hearing.[89] His testimony revealed in part the following: (1) that he had not retained an investigator or sought a mental health evaluation on Coleman's behalf because "he believed Coleman's alibi defense"; (2) that he had

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85 *Id.*at 1216.
86 *Id.* at 1217 (quoting Sochor v. State, 883 So. 2d 776, 771-72 (Fla. 2004)) (internal quotation mark omitted).
87 *Id.* at 1218.
88 *Id.* at 1218-19.
89 *Id.* at 1219.

spent more time preparing for the guilty phase than he did for the penalty phase; (3) that he had never inquired into whether Coleman was in special education classes, abused drugs, or suffered a head injury; (4) that had had relied on information he had "obtained from Coleman and Coleman's friends and family in developing mitigation for the penalty phase"; and (5) that he had made a strategic decision not to present mitigating evidence that "would put Coleman in a bad light or make him appear to be capable of murder." [90] In summary, Stokes testimony revealed that he did not spend much time preparing for the penalty phase because "he had no reason to believe he needed to pursue mitigation for the penalty phase" because "he was convinced Coleman was innocent" and that he strategically decided not to present "mitigating evidence of Coleman's childhood and background or mental state."[91]

The Florida Supreme Court has "held that strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct."[92] To illustrate, the court has found counsel's performance unreasonable under the norms of professional conduct and sufficiently deficient under the first prong of the *Strickland* test when trial counsel failed to properly investigate and prepare for the penalty phase of the trial and presented no mitigation evidence whatsoever.[93] "The State contend[ed] that Stokes' failure to conduct an investigation was reasonable because, pursuant to his alibi defense and his maintenance of innocence, Coleman did not provide Stokes with any mitigation, and such mitigation may have

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90 *Id.* at 1210, 1219-20.
91 *Id.* at 1220.
92 *Id.* at 1217 (quoting Occhicone v. State, 768 So. 2d 1037, 1048 (Fla. 2000)) (internal quotation mark omitted).
93 *Id.* at 1223 (citing Deaton v. Dugger, 635 So. 2d 4 (Fla. 1993)).

been harmful to Coleman's case."[94] The court acknowledged that "[t]rial counsel's duty to investigate can be affected by the defendant's conduct, 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."[95] However, the court was not persuaded by the State's argument because the record was "devoid of any indication that Stokes ever inquired about Coleman's past or possible mitigation."[96] Furthermore, the record did "not reflect that, at any time, Coleman actively concealed mitigating factors or that he instructed Stokes not to pursue an investigation of mitigation."[97] The court explained that "[i]n the event that Stokes had actually performed an investigation, he would have been entitled to make strategic decisions in deciding whether to present some or all of the potential mitigation."[98] The court found, however, that Stokes had "made his decision to not present any mitigating evidence prior to conducting an investigation and prior to discovering whether any worthwhile mitigation existed. Thus, Stokes was deficient in failing to investigate and uncover readily available mitigating evidence regarding Coleman."[99] Based on these circumstances, the court concluded that Coleman had demonstrated that "Stokes rendered deficient performance under *Strickland*."[100]

In its analysis of the second prong of the *Strickland* test, the court noted that in the past it "has found prejudice where trial counsel failed to present mitigating evidence to the *judge* and

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94 *Id.* at 1222.
95 *Id.* (quoting Strickland v. Washington, 466 U.S. 668, 691 (1984)) (internal quotation mark omitted).
96 *Id.*
97 *Id.*
98 *Id.* at 1223.
99 *Id.*
100 *Id.*

such evidence would have precluded the judge from overriding the jury recommendation."[101] The court articulated the proper standard for determining whether a jury override is permissible in *Tedder v. State*: "the trial court is precluded from overriding the jury's life recommendation unless the court can state that the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ."[102] In determining "whether the mitigating evidence that was presented at the 2001 postconviction evidentiary hearing would have produced a reasonable basis for the jury's recommendation for life," the court looked at the 11 kinds of mitigating evidence that Coleman had presented and noted that it has repeatedly recognized "the importance and significance of this kind of mitigation" and "each of the mitigating factors above as being valid mitigation."[103] The court held that "if Stokes had properly presented the aforementioned mitigating evidence, the trial judge would have had to view it in light most favorable to the defendant and would have been precluded from overriding the jury."[104] Thus, the court held "Stokes' failure to investigate and present the mitigation evidence deprived Coleman of a reliable penalty phase proceeding."[105] In other words, Stokes deficient performance prejudiced Coleman. The court vacated Coleman's death sentences and remanded for imposition of a life sentence on each of the first-degree murder counts, concluding that "[o]nce a defendant has demonstrated that the mitigation presented would have provided a reasonable basis for the jury recommendation, the defendant is entitled to a life sentence."[106]

B. *Simmons v. State*

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[101] *Id.* at 1224 (citing Williams v. State, 987 So.2d 1, 14 (Fla. 2008)).
[102] *Id.* at 1213, 1226 (alteration in original) (quoting Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975)) (internal quotation mark omitted).
[103] *Id.* at 1224-25.
[104] *Id.*at 1225.
[105] *Id.*
[106] *Id.* at 1227.

Eric Simmons was convicted of first-degree murder, kidnapping, and sexual battery using force likely to cause serious injury for the stabbing and beating death of Deborah Tressler.[107] Tressler's body was discovered "in a large wooded area commonly used for illegal dumping."[108] The autopsy revealed numerous injuries, those that unquestionably occurred premortem are as follows: some ten lacerations on her head; numerous lacerations and scrapes on her scalp and face; a very large fracture on the right side of her head; her skull was broken into multiple small pieces that fell apart when her scalp was opened by the medical examiner; a stab wound in the right lower part of her abdomen that extended into her abdominal cavity; numerous defensive wounds on her forearms and hands; numerous injuries to her anus with bruising on the right buttock extending into the anus; and a laceration on the wall of her rectum.[109] The medical examiner opined that the injuries to her anus and rectum "would be painful and not the result of consensual anal intercourse."[110] Simmons' semen was found in Tressler's vagina, and her blood was found in Simmons' car.[111] Also, tire tracks found near Tressler's body matched the tire tracks of Simmons' car's tires.[112]

After the jury found Simmons guilty of the aforementioned crimes, the case proceeded directly to the penalty phase.[113] Simmons' counsel presented two mitigation witnesses: Sergeant Craig Leslie, a Lake County correctional officer, who testified "about Simmons' good jail record, but also related that Simmons asked to be housed separately from other inmates after his verdict because, he said, he might hurt someone," and Ashley Simmons, Simmons' sister, who

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107 Simmons v. State, 105 So.3d 475, 483 (Fla. 2012).
108 *Id.*
109 *Id.*at 484.
110 *Id.*
111 *Id.* at 485.
112 *Id.*
113 *Id.*

testified that "Simmons came from a close, Christian family, and was involved in church and other community activities. However, she made critical comments concerning the victim of the case."[114] "[T]he jury unanimously found three aggravating factors had been proven and recommended a sentence of death."[115] After the penalty phase jury proceeding, "the trial court held a *Spencer* hearing at which the defense presented Dr. Elizabeth McMahon, who testified that Simmons had a moderate to severe learning disability and no significant history of violence."[116] The trial court imposed a death sentence "based on finding and weighing three aggravators against eight nonstatutory mitigators."[117]

The circuit court denied Simmons' postconviction relief motion to vacate his first-degree murder conviction and sentence of death.[118] Simmons appealed the circuit court's order and petitioned for a writ of habeas corpus, contending, among other things, that his trial counsel was ineffective during the guilt and penalty phases of his trial. [119] I will address only the penalty phase claims, however, because the guilt penalty claims are beyond the scope of this paper.

Simmons claimed that his trial counsel "was deficient in failing to fully investigate and present substantial mental and background mitigation" and that this deficient conduct deprived

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[114] *Id.* at 504.
[115] *Id.* at 485 & n. 2 ("The aggravators found unanimously by the jury were (1) prior violent felony conviction; (2) the capital crime was committed while the defendant was engaged in the commission of, or attempt to commit, sexual battery, kidnapping, or both; and (3) the capital crime was committed in an especially heinous, atrocious, or cruel manner (HAC).").
[116] *Id.* at 485 (citation omitted). *See generally* Spencer v. State, 615 So. 2d 688, 690-91 (Fla. 1993) (A *Spencer* hearing is a sentencing phase proceeding that takes place after the jury has recommended a sentence. "First, the trial judge should hold a hearing to: a) give the defendant, his counsel, and the State, an opportunity to be heard; b) afford, if appropriate, both the State and the defendant an opportunity to present additional evidence; c) allow both sides to comment on or rebut information in any presentence or medical report; and d) afford the defendant an opportunity to be heard in person. Second, after hearing the evidence and argument, the trial judge should then recess the proceeding to consider the appropriate sentence.").
[117] *Simmons*, 105 So. 3d at 486.
[118] *Id.* at 483.
[119] *Id.*

him of a reliable penalty phase proceeding.[120] The court stipulated that in order for Simmons to show that his trial counsel was ineffective, he "must show that but for his counsel's deficiency, there is a reasonable probability he would have received a different sentence."[121]

> To assess that probability, we consider the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the [evidentiary hearing]—and reweig[h] it against the evidence in aggravation.[122]

At the postconviction evidentiary hearing, Coleman's trial counsel Janice Orr testified that "she did not consult a mental health expert when she took over representation of Simmons. She believed he was competent and did not investigate any other aspects of mental mitigation."[123] Dr. McMahon, who had previously testified at the *Spencer* hearing, testified that "she never thought it necessary to order a PET scan of Simmons' brain, even though she was aware that he experienced a partial suffocation incident as a toddler that required medical intervention."[124]

Postconviction counsel for Simmons presented the testimony of three expert witnesses who had examined and tested Simmons: Dr. Henry Dee, Dr. Frank Wood, and Heidi Hanlon-Guerra.[125] "Dr. Henry Dee, a psychologist and expert in neuropsychology, examined Simmons' school records, his special education records, and a forensic assessment performed by Simmons' first attorneys at the public defender's office. Dr. Dee also met with Simmons three times, [and] performed a neuropsychological evaluation of Simmons for possible mitigation."[126] He also

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120 *Id.* at 503.
121 *Id.* (quoting Porter v. McCollum, 558 U.S. 30, 41 (2009)) (internal quotation mark omitted).
122 *Id.* (quoting 558 U.S. at 41) (internal quotation mark omitted).
123 *Id.*at 504.
124 *Id.*
125 *Id.*at 504-06.
126 *Id* at 504.

conducted two forms of intelligence tests and "two tests to assess cerebral damage and frontal lobe functioning."[127]

> Dr. Dee testified that Simmons' school records showed problems with language functioning not proportional to his intellectual functioning. . . . Simmons was impulsive and overactive in school and had behavioral problems. . . . Simmons was placed in learning disability classes in second or third grade, and was later placed in special education classes. Simmons was placed in an EH (emotional handicap) class before age nine or ten. By nine or ten, Simmons was placed in SED (severely emotionally disturbed) classes. Simmons dropped out of school in the ninth or tenth grade. Dr. Dee opined that being placed in these special classes led to problems with social acceptance and conflicts with other children, and that this affected Simmons' later employability and limited his ability to adjust to the workplace.[128]

Based on his opinion of Simmons' neuropsychological condition, Dr. Dee recommended "a PET scan to determine if Simmons had brain damage."[129]

> This recommendation was based in part on information from Simmons' mother and sister that as an infant, Simmons was accidentally suffocated and taken to the hospital where he was finally revived. . . . Dr. Dee testified that the PET scan confirmed his opinion of neuropsychological impairment that resulted in years of problems in Simmons' schooling and which also resulted in impulsivity and behavioral problems. [He] opined that Simmons' brain damage led to a "sort of pervasive maladjustment." [He] testified that Simmons also had a borderline personality disorder that manifested in fear of rejection and abandonment, running away from home, affective instability, depression, extreme self-criticism, and social isolation. . . . Dr. Dee also learned from Simmons' school records that he began using marijuana at age nine and by his mid-teens was consuming up to twelve beers a day. Simmons reported continuing to drink at this level as an adult and to use marijuana three to six times a week. Dr. Dee also testified that people with brain damage are more sensitive to alcohol and drugs. Dr. Dee learned that when Simmons was young, his father was sent to prison for four years on a homicide conviction, causing financial and other hardships for the family. Dr. Dee opined that Simmons met the criteria for the extreme mental or emotional disturbance statutory mitigator because of the extensive effects of brain damage early in childhood, which impaired his ability to learn and function socially, and to control himself and not be impulsive. Dr. Dee also opined that Simmons could

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127 *Id.*
128 *Id.*
129 *Id.*at 504-05.

> appreciate the criminality of his conduct but had an impaired capacity to conform his conduct to the requirements of law, also a statutory mitigator.[130]

Simmons' postconviction counsel also presented the testimony of Dr. Frank Wood, a psychologist and expert in neuropsychology who was "experienced in the use of PET scan measurements to evaluate brain function."[131] Dr. Wood testified that the PET scan of Simmons' brain revealed abnormalities that were "sufficient to cause him to conclude that Simmons had real trouble understanding people and social context around him."[132] Dr. Wood also testified that in his opinion, the PET scan provides sufficient basis to find that Simmons is persistently and substantially impaired and acts under the influence of extreme mental or emotional disturbance. Dr. Wood also opined that the PET scan corroborates a finding, based on the evidence presented by Dr. Dee, that Simmons meets the criteria for the statutory mitigator of lacking the capacity to appreciate the criminality of his conduct or to conform it to the requirements of law."[133]

Simmons' postconviction counsel presented the testimony of Heidi Hanlon-Guerra, a psychotherapist and mitigation specialist.[134] Hanlon-Guerra "conducted a psychosocial evaluation of Simmons with special attention to substance abuse issues and mitigating circumstances."[135] Hanlon-Guerra concluded that, "in her opinion, Simmons never developed the skills to live in the adult world."[136]

"The State presented the testimony of Dr. Larry Holder, nuclear medicine physician, diagnostic radiologist, and professor of radiology at Shands Hospital, concerning the subject of PET scans. Dr. Holder testified that he reviewed the PET scan of Simmons' brain," and in his

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130 *Id.*
131 *Id.*at 505.
132 *Id.*
133 *Id.*
134 *Id.*at 506.
135 *Id.*
136 *Id.*

opinion, Simmons' brain was not abnormal like Dr. Dee and Dr. Wood had asserted.[137] However, Dr. Holder noted that "he was not a neuropsychologist or a neurologist," nor had he examined Simmons or "read any reports of Simmons' functional ability, and therefore [did] not know how Simmons' brain is functioning."[138]

Although Dr. Holder's testimony that Simmons' brain was not abnormal directly conflicted with the testimony of Dr. Wood and Dr. Dee, the court held that Dr. Wood's and Dr. Dee's opinions regarding the abnormality could not be completely discounted as possible mitigation because "we have consistently recognized that severe mental disturbance is a mitigating factor of the most weighty order, and the failure to present it in the penalty phase may constitute prejudicial ineffectiveness."[139]

The court acknowledged that the heinous, atrocious, and cruel (HAC) aggravating factor that the trial judge and jury had found "is considered especially weighty."[140] However, the court held, "the existence of weighty aggravators such as HAC will not necessarily defeat the need to reverse for a new penalty phase where counsel failed to investigate or present mental mitigation."[141]

> Even though Dr. Holder's testimony was contradictory to the PET scan testimony presented by Simmons' expert, the significant body of mitigation evidence that was presented at the evidentiary hearing leads us to conclude that counsel was ineffective in fully investigating possible mitigation and in presenting that available mitigation to the jury.[142]

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137 *Id.*
138 *Id.*
139 *Id.* (quoting Hurst v. State, 18 So. 3d 975, 1014 (Fla. 2009)).
140 *Id.*at 506-07.
141 *Id.* at 507 (citations omitted).
142 *Id.* (citations omitted).

The court reasoned that where "available information indicates that the defendant could have significant mental health problems, such an evaluation is fundamental in defending against the death penalty."[143]

The State argued that Simmons "expressly wanted to rely on his claimed innocence and did not want to present evidence to the jury that he had a low IQ, mental deficits, or an alcohol or substance abuse problem."[144] Thus, the State contended, trial counsel rendered effective performance because it "had a reasoned strategy agreed to by Simmons and his family to present to the jury only mitigation showing that Simmons was a good man and from a good family, who helped others in his family and the community."[145] The court noted that "even assuming trial counsel made the decision to humanize Simmons and only present positive mitigation about him personally, Simmons' jury heard 'almost nothing' in this regard."[146] The court further noted that "the Supreme Court has held that 'counsel's failure to uncover and present voluminous mitigating evidence at sentencing could not be justified as a tactical decision . . . because counsel had not fulfill[ed] their obligation to conduct a thorough investigation of the defendant's background.'"[147] The court pointed out that Simmons' trial counsel had available material showing that Simmons had low intelligence, was in special education and classes for the emotionally handicapped in school, dropped out of school early, and suffered the loss of oxygen to his brain as a toddler."[148]

> [Counsel] also knew that he had substance abuse problems. Counsel did not advise Simmons of the importance of presenting such mitigation to the penalty

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143 *Id.* (quoting Arbelaez v. State, 898 So. 2d 25, 34 (Fla. 2005)) (internal quotation mark omitted).
144 *Id.*
145 *Id.*
146 *Id.*
147 *Id.* (quoting Sears v. Upton, 130 S. Ct. 3259, 3265 (2010)) (internal quotation mark omitted).
148 *Id.* at 508.

> phase jury or the court, but instead simply focused on the guilt phase and accepted Simmons' request not to present anything embarrassing or bad about him. . . .
>
> Moreover, nothing was presented below to show that the possible benefits of the significant, available mitigation presented at the evidentiary hearing would have been offset in the penalty phase by the danger of disclosing something harmful.[149]

The court observed that "[i]f the intent was to present substantial evidence humanizing Simmons, that result does not appear to have been achieved."[150] Because "counsel may be deemed ineffective at the penalty phase where the investigation of mitigating evidence is 'woefully inadequate' and credible mitigating evidence existed which could have been found and presented at sentencing," the court ruled as follows:

> [T]here was also a large amount of mitigating evidence that could have been unearthed and presented in the penalty phase. The decision made by trial counsel to limit mitigation without knowing the full extent of available mitigation was not a reasonable strategic decision based on full information. . . . The record in this case does not show that counsel knew the full extent of the available alternative course for presentation of mitigation and made a reasonable strategic decision under the circumstances. Defense counsel Orr testified at the evidentiary hearing that she was focused on the guilt phase and was shocked when the jury found Simmons guilty. Defense counsel Pfister, who was supposed to be responsible for the guilt phase, also failed to impress upon Simmons and his family the importance of presenting all available mitigation. Based on the foregoing, we conclude that both trial counsel were ineffective in their investigation and presentation of mitigation to the jury in the penalty phase.
> . . . . The evidence presented in the evidentiary hearing—much of which was not discovered by trial counsel—even when considered in light of trial counsel's explanation that she was only doing what Simmons requested, is sufficient to undermine this Court's confidence in the death sentence in this case.[151]

Consequently, the court vacated the death sentence and remanded for a new penalty phase proceeding.[152]

V. Ohio Ineffective Assistance of Counsel Cases

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[149] *Id.*
[150] *Id.* at 509.
[151] *Id.* at 509-10.
[152] *Id.* at 510.

A. *State v. Herring*

Willie Herring and his four co-defendants entered a bar with the intent to commit robbery while wearing facial coverings and bearing firearms.[153] Herring played a large part in organizing the robbery and encouraged his co-defendants to participate, providing them with guns and making instigating remarks such as "[i]f you all know like I know, then you want to get paid."[154] Herring further demonstrated premeditation of the crime by being the only defendant who wore an actual mask; his co-defendants covered their faces with T-shirts or bandannas.[155] Herring was convicted by jury of three counts of complicity to commit aggravated murder, two counts of attempted aggravated murder, two counts of aggravated robbery, and six firearm specifications.[156] "The jury found that [Herring] was guilty of conduct involving the purposeful killing or attempt to kill two or more persons, multiple murder death-penalty specifications. It recommended the death sentence for all three murders," which the court imposed, and the Ohio Supreme Court affirmed.[157] Herring's motions for postconviction relief were denied, and he appealed, contending that his trial counsel, Zena and Van Brocklin, "were ineffective because they only presented two witnesses at his mitigation hearing, his mother and his sister."[158] Furthermore, he argued, "his counsel should have presented his extensive negative history to the jury and also should have secured his neuropsychological evaluation and presented corresponding expert testimony as mitigation evidence."[159]

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[153] State v. Herring, No. 08-MA-213, 2011 WL 497765, at *1 (Ohio Ct. App. 2011).
[154] *Id.*
[155] *Id.*
[156] *Id.* at *2.
[157] *Id.*
[158] *Id.* at *3.
[159] *Id.*

At trial, apart from presenting the testimony of Herring's mother and sister in mitigation, Herring's counsel made only one other argument in support of sparing his life: "that his co-defendants did not receive the death penalty."[160] Herring argued that since trial counsel "did not present any negative mitigation evidence . . . going to his history, character, or background, nor did it present evidence as to any mental disease or defect" he may have suffered from, its performance was unreasonable under the current professional standards for capital defense work.[161] Herring specifically asserted that his "counsel fell short in meeting the ABA's standards" for capital defense work.[162]

Herring's ineffectiveness claim is comprised of three major arguments: First, although trial counsel hired Thomas J. Hrdy, a mitigation specialist, to conduct a mitigation investigation, "counsel's assumption that Hrdy's investigation was all that they needed to prepare for mitigation without any investigation on their own was unreasonable and deficient."[163] Second, "counsel's decision to present only positive mitigation evidence was unreasonable," and third, "both counsel testified that the jury makeup had a great deal of influence on their mitigation theory. . . . Thus, no investigation was completed by the time counsel were choosing a jury."[164]

The court acknowledged the validity of Herring's arguments, stating that "[o]nly after completing a full investigation can counsel make an informed, tactical decision about what

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[160] *Id.* at *5.
[161] *Id.*
[162] *Id.* (Herring identified six ABA standards his counsel fell short of meeting: failure to conduct an extensive personal and family history; failure to explore family and social history; failure to locate and interview his family members; failure to "conduct a multi-generational investigation"; failure to "choose experts who are specifically tailored to the needs of the case"; and failure to "prepare to rebut arguments that improperly minimize the mitigation evidence's significance.").
[163] *Id.* at *3, *5.
[164] *Id.* at*6.

information to present in their client's case."[165] Herring attached affidavits "executed by family members, Hrdy, a psychologist, and a mitigation specialist" to his postconviction petition.[166] The affidavits were comprised of "information [trial] counsel could have uncovered had they conducted a comprehensive investigation."[167] The court compared the information revealed in the affidavits to the sentencing court's opinion.[168]

The extended family affidavits revealed the following about Herring: (1) he "had almost lifelong involvement in gangs"; (2) his "mother abused crack cocaine for approximately 12 years while he was growing up"; (3) his "father was shot and killed, apparently in a drug dispute in 1983 when [he] was only a toddler"; (4) he "started selling drugs and carrying a gun in his early teens"; (5) "growing up, [his] stepfather was addicted to drugs"; (6) he "abused alcohol and drugs almost daily since an early age"; (7) he "dropped out of high school in the tenth grade, and his mother did not know if he ever graduated"; (8) his "grandmother's telephone calls and request to testify were unreturned by his trial counsel"; and (9) his "aunt, uncle, cousin, and grandmother would have testified had they been asked."[169]

Hrdy concluded in his affidavit that "he provided substandard mitigation investigation resulting from his lack of adequate time to prepare."[170] The affidavit also reveals that Hrdy "did not do his intended requisite research," and that he was "uncertain whether he advised [Herring's] trial counsel of his failure."[171] The affidavit contained an attachment that set out

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[165] *Id.* at *7 (citing State v. Johnson, 494 N.E.2d 1061, 1064 (Ohio 1986)).
[166] *Id.*
[167] *Id.*
[168] *Id.* at *10.
[169] *Id.* at *7.
[170] *Id.* at*8.
[171] *Id.*

Hrdy's "intended course of action relevant to [Herring's] mitigation, however, Hrdy's affidavit confirms his failure to complete most of his identified tasks."[172]

Jolie S. Brams, Ph.D., a psychologist, was contacted after Herring's conviction to "review the quality and thoroughness of the mitigation presented at [the] sentencing hearing, with regard to the requisite psychological analysis."[173] In her affidavit, she stressed "that [Herring's] trial counsel did not dwell on [his] youth," even though he was 19 at the time of the offense, "that counsel inaccurately presented [Herring's] family as caring," and "that the jury was never advised of [his] dysfunctional role models."[174] In addition to reviewing the trial court documents, Brams analyzed "the public defender mitigation specialist's interviews with [Herring] and his family."[175] She stated in her affidavit the following in part:

> [Herring] was not exposed to adults whose behavior placed them anywhere within the normative range of socially accepted behavior in our society. . . . [Rather he was] actually dissuaded from engaging in behaviors that did not fit this familiar and sociocultural norm. [He] would have been an outcast of his family had he chosen to behave differently . . . .
> . . . .
> The persons given the responsibility of supervising [him throughout his childhood] were intoxicated, engaging in criminal activities on a daily basis, or generally unconcerned with his functioning. These issues are a remarkably important part of [his] developmental history.
> . . . .
> Lastly, substance abuse seemed to be a way for [Herring] to self-medicate a significant degree of depression.
> . . . .
> . . . . Without this presentation [of Herring's substance abuse and history], juror . . . saw only a young drug dealer, and user [sic] not a fully humanized portrait of a young man who was faced with serious difficulties in his life . . . .
> . . . .
> . . . . [E]ven as an adult, [Herring's] perceptual learning skills are only those of a ten-year old.[176]

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[172] *Id.*
[173] *Id.*
[174] *Id.* (internal quotation mark omitted).
[175] *Id.*
[176] *Id.* at *8-9.

Brams testified that based on Herring's "specific IQ and achievement profiles, his history which is suggestive of learning disabilities, and his chronic and early on set [sic] substance abuse, a neuropsychological evaluation should have [been] conducted to establish whether [Herring] suffer[ed] from organic brain impairment."[177] Bram concluded that a neuropsychological and general psychological evaluation should have been conducted at the time of trial.[178]

Dorian L. Hall, a mitigation specialist, provided in his affidavit that he had "extensive involvement in death penalty cases and stresse[d] the importance of psychological investigation and analysis for the mitigation phase of a capital sentencing."[179] Hall also listed "the records, documents, and the interviews that should have been conducted and analyzed in [Herring's] case."[180] Hall concluded that Herring "should have been evaluated by a neuropsychologist to determine whether brain impairment exists."[181]

The court held that all of the information contained in the affidavits goes to statutory mitigation factors "that *shall* be considered when weighing whether to impose the death penalty."[182] The court also noted that this information is "considered highly relevant by the American Bar Association's Professional Standards: [i]nformation concerning the defendant's background, education, employment record, mental and emotional stability, family relationships, and the like, will be relevant, as will mitigating circumstances surrounding the commission of the

[177] *Id.* at *9.
[178] *Id.*
[179] *Id.*
[180] *Id.*
[181] *Id.*
[182] *Id.* at *10.

offense itself. *Investigation is essential to fulfillment of these functions*."[183] Not only did the court find that the mitigating information applied to highly relevant factors, but "[m]ost importantly, the information in the affidavits brought to light [Herring's] deeply troubled childhood, his complete lack of any positive role models, his substance abuse problems, his depression, his low IQ, and his possible organic brain impairment. These areas of [Herring's] life, had they been investigated and explored fully, are all very significant factors to be weighed and considered in determining what mitigation evidence to present. And counsel did not have this information before them when they made the decision to present only positive mitigation evidence."[184] The court emphasized the fact that "Hrdy himself admitted in his affidavit that his investigation was 'substandard' and that he did not complete many of the tasks that he should have in investigating appellant's background."[185] The court also emphasized the telling nature of Herring's trial counsel's testimony from the postconviction hearing. Both attorneys "said that they did not want to go the route of presenting negative mitigation evidence."[186] Attorney Zena "testified that he knew nothing specific about [Herring's] family at the time of the trial or any negative information."[187] Furthermore, "[w]hen asked was the decision to present only positive mitigation evidence a conscious choice, [he] responded, *To the extent of what I thought was there*, yes."[188] Attorney Van Brocklin, when similarly asked about the mitigation theory, stated 'that basically *at the time is what we had* to—in my estimation, to work with. *We had not received any other*

[183] *Id.* (quoting Powell v. Collins, 332 F.3d 376, 399 (6th Cir. 2003)) (internal quotation mark omitted).
[184] *Id.*
[185] *Id.*
[186] *Id.*
[187] *Id.*
[188] *Id.* (internal quotation mark omitted).

information from Mr.Hrdy."[189] The court held that Herring's trial counsel's testimony "further confirm[ed] that Hrdy's investigation, and therefore, trial counsel's mitigation investigation was less than adequate."[190] The court further noted that trial counsel's performance fell below the standards of the ABA Guidelines: the information regarding Herring's family life and background was "reasonably available," and since "it is trial counsel's duty to ensure that a complete investigation is undertaken," "counsel could not simply rely on Hrdy's investigation."[191]

In its conclusion, the court stated that "[in] considering whether trial counsel exercised reasonable professional judgment, the central question is not whether counsel should have presented a mitigation case. Rather, we focus on whether the investigation supporting counsel's decision not to introduce mitigating evidence of . . . [the defendant's] background *was itself reasonable*."[192] The court further stated that "[a]bsent a full investigation, counsel could not have made an informed decision on what mitigation evidence to present." Therefore, the court concluded, "[g]iven the wealth of mitigating evidence that could have been discovered in this case had counsel conducted a thorough background investigation . . . we cannot conclude that the investigation itself was reasonable."[193]

As to the prejudice prong of the *Strickland* standard, the court concluded that "the undiscovered mitigating evidence in this case 'might well have influenced the jury's appraisal' of [Herring's] culpability and the probability of a different sentence if counsel had presented the

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[189] *Id.* (internal quotation mark omitted).
[190] *Id.* at *11.
[191] *Id.*
[192] *Id.* at *12 (quoting Wiggins v. Smith, 539 U.S. 510, 522-23 (2003)) (internal quotation mark omitted).
[193] *Id.*

evidence is 'sufficient to undermine confidence in the outcome' reached by the jury."[194] For the aforementioned reasons, the court concluded that "the trial court's decision denying postconviction relief was an abuse of discretion."[195] The case was reversed and remanded to trial court for a new sentencing hearing.[196]

B. *State v. Perez*

Kerry Perez confessed that on June 22, 2002, he committed an armed robbery at the Beverage Oasis drive-through liquor store and shot at the owner of the store, Clifford Conley, during the commission thereof.[197] Perez further confessed that on March 5, 2003, he committed an armed robbery at the bar The Do Drop Inn and shot Ronald Johnson, a bar patron, during the commission thereof.[198] Perez also confessed to a series of armed robberies between May 29, 2002, and September 11, 2002; however, no one was killed during any of those robberies.[199] Perez was tried and convicted by jury of the aggravated murder of Ronald Johnson during an aggravated robbery and of both death specifications attached to it: murder during an aggravated robbery and course of conduct.[200] The jury recommended a death sentence, which the trial court imposed.[201] Perez appealed his convictions and death sentence, contending, among many other issues—which I will not address because they are outside the scope of this paper—that his trial counsel was ineffective for conceding to his guilt of an aggravating circumstance during the guilt

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194 *Id.* at *13 (quoting Rompilla v. Beard, 545 U.S. 374, 393 (2005)).
195 *Id.*
196 *Id.* at *1.
197 State v. Perez, 920 N.E.2d 104, 116 (Ohio 2009).
198 *Id.*
199 *Id* at 117.
200 *Id.*
201 *Id.*

phase of the trial and for presenting "inadequate mitigating evidence as a result of its inadequate investigation of his history and background."[202]

Perez's guilt-phase ineffective assistance of counsel claim sprouts from a statement counsel made in its opening statement: that Perez had confessed "because he knew that there's no . . . serious dispute about what happened or who did it. Mr. Perez knows that in all probability, you 12 jurors will reach the second phase of this trial and you will deliberate on whether to put him to death or not."[203] Perez argued that conceding guilt constituted ineffective assistance of counsel since "there were valid issues concerning the validity of the course of conduct charge that defense counsel should have argued to the jury."[204] The court disagreed, noting that "[c]onceding guilt in a capital case does not necessarily constitute deficient performance,"[205] and "[a]ttorneys representing capital defendants face daunting challenges in developing trial strategies, not least because the defendant's guilt is often clear. . . . In such cases, avoiding execution [may be] the best and only realistic result possible."[206] The court held that Perez's guilt was clear for the following reasons: (1) Perez's confession was videotaped; (2) Perez admitted guilt of these crimes to his wife; (3) eyewitness accounts of the robberies were "basically consistent with Perez's admissions"; (4) the gun Perez had borrowed was found at the Beverage Oasis crime scene; (5) evidence established that Perez owned the gun that he admitted he used to kill Johnson; (6) Perez had detailed knowledge of the location on Conley's body where he was shot; and (7) the masks worn during the robberies had been seen in Perez's

[202] *Id.* at 136, 138.
[203] *Id.* at 136.
[204] *Id.* (internal quotation mark omitted).
[205] *Id.* (quoting State v. Johnson, 858 N.E.2d 1144, ¶ 134 (Ohio 2006)).
[206] *Id.* (quoting Florida v. Nixon, 543 U.S. 175, 191 (2004)) (internal quotation mark omitted).

closet.[207] The court found that "[g]iven this evidence, it was rational for defense counsel to concede that Perez had committed the acts in question."[208] Thus, counsel's concession didn't constitute deficient performance.

Perez argued that despite the overwhelming evidence against him, his trial counsel "should have at least contested the course-of-conduct specification, rather than conceding that the jury would probably reach the second phase of [the] trial."[209] The court held, however, that "the evidence clearly established the existence of a course of conduct involving two intentional killings or attempts to kill."[210] However, even if Perez's argument was successful, it wouldn't satisfy the prejudice prong of *Strickland* because, as the court recognized, "Perez ignores the fact that he was charged with *two* death specifications, and the felony-murder specification was also supported by overwhelming evidence. Thus, even had counsel elected to challenge the course-of-conduct specification, they could still rationally concede that 'in all probability,' the trial would reach the penalty phase."[211]

Perez contends that his counsel was ineffective by failing to perform an adequate investigation in to his history and background and by failing to present adequate mitigating evidence at the penalty phase of his trial.[212] Trial counsel "called only one witness in the penalty phase: Ray J. Paris, Perez's stepfather."[213] Paris "begged the jury to spare Perez's life," and "testified that Perez's parents were not around much during his childhood and that Perez's late

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[207] *Id.* at 137.
[208] *Id.*
[209] *Id.* (internal quotation mark omitted).
[210] *Id.*
[211] *Id.*
[212] *Id.* at 138.
[213] *Id.*

mother had been a prostitute."[214] Perez argued that trial counsel "should have presented information to assist [the jury] in understanding the dynamic within the family or the family history of dysfunction. Perez further [argued] that counsel should have investigated his possible 'mental health issues' on the basis of Perez's recorded statements."[215] The statements to which he referred were from the taped conversation with his wife where he "mentioned that he had been found competent to stand trial on the unrelated case in which he was being held," and from his videotaped confession, where "he told detectives that he had 'major mental issues' and took 'eight pills every night' for '[b]ipolar, mental psychosis.' But he also said that he had not been on any medication and was not having any 'issues' on the night of the murder."[216] The court pointed out that "Perez cite[d] nothing in the record to show that his counsel conducted a less than adequate investigation."[217] The court further noted that "Perez underwent a competency evaluation in this case." The psychiatrist's report from it provides the following: "Perez was raised in group homes and juvenile facilities and that he reported a childhood history of physical abuse and marijuana use. Perez also reported hallucinations and suicidal and paranoid ideation. The report also cites indications of malingering and concludes that Perez had no serious psychiatric disorder."[218] The court acknowledged that the report showed some possible mitigating factors.[219] However, the court held, "the record does not show that Perez's counsel failed to investigate those factors. We 'cannot infer a defense failure to investigate from a silent record.'"[220]

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214 *Id.*
215 *Id.*
216 *Id.*
217 *Id.*
218 *Id.* at 139.
219 *Id.*
220 *Id.* (quoting State v. Were, 890 N.E.2d 263, ¶ 244 (Ohio 2008)).

Perez also contended that "his counsel's penalty phase argument discounted the importance of what mitigating evidence did exist concerning his childhood and mental health."[221] In the penalty phase argument, trial counsel stated:

> We told you when we started this case [Johnson's] death was senseless, and we offer no excuses. It's not anybody else's fault but Kerry Perez. We told you that when we started. I tell you that again today.
>
> His mom was a prostitute; that's not an excuse. We wanted you to know some of the things about his childhood, but that's not an excuse. That didn't cause him to do what he did, and so I make no excuse.[222]

The court held that trial counsel's statement reflected "a decision to downplay Perez's background as a mitigating factor while emphasizing other factors, such as Perez's cooperation with the police and his loyalty to his wife. By doing so, defense counsel was able to project an image of candor, reason, and acceptance of responsibility, without making any really damaging concession. This decision was not professionally unreasonable."[223] The court concluded that Perez also failed to satisfy the prejudice prong of *Strickland* since it could not "be said that there was a reasonable likelihood of a different outcome in the penalty phase had defense counsel eschewed the 'no excuses' argument."[224]

It should be noted that *Perez* is the only case featured in this paper that is a direct appeal from a death sentence. While it is usually in a defendant's best interest to bring ineffective assistance of counsel claims in a postconviction proceedings because then they can present additional evidence that wasn't presented at trial, "[a] claim of ineffective assistance of counsel presented in a postconviction petition may be dismissed under the doctrine of res judicata when the petitioner, represented by new counsel on direct appeal, has failed to raise on appeal the issue

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[221] *Id.*
[222] *Id.*
[223] *Id.*
[224] *Id.*

of trial counsel's competence and the issue could fairly have been determined without evidence dehors the record."[225]

VI. Conclusion

Florida and Ohio's laws, while facially different, do not differ significantly in effect as applied. Likewise, the common law application and interpretation of ineffective assistance of counsel standards, as illustrated by the above-mentioned cases, doesn't seem to differentiate by jurisdiction: both jurisdictions do not apply a heightened version of the *Strickland* standard; both, while not often citing to *Cronic* in their opinions, seem to follow the *Cronic* standard by regularly finding an inherent prejudice when counsel has performed an inadequate mitigation investigation; both award great weight to mental health mitigation;—in fact, the potential existence of undiscovered mental health mitigation was grounds for finding ineffective assistance of counsel in most cases—and both articulated that a strategic decision to not present mitigating evidence cannot be made until a proper mitigation investigation has been conducted. For example, in *Simmons*, the court found ineffective assistance of counsel when counsel didn't present mitigation evidence because although defendant's family only wanted to present positive evidence, counsel made its decision to ignore the mitigating evidence before fully investigating and developing it and it failed to advise the client as to the importance of mitigating evidence. In contrast, the court in *Perez* found counsel was effective and its trial strategy to present only positive evidence was reasonable because a psychological evaluation conducted before trial showed no serious disorder. In conclusion, to perform effectively, counsel should dedicate adequate time to conduct a mitigation investigation and should only make a decision to not

[225] State v. McKnight, No. 07CA665, 2008 WL 2124076, *7 (Ohio Ct. App. 2008) (quoting State v. Sowell, 598 N.E.2d 136, 141 (Ohio Ct. App. 1991)).

present mitigation evidence at trial if a sufficient investigation into the defendant's background has been completed.