

**CAPITAL CASE NO. SC22-1671**

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In the

**Florida Supreme Court**

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**STATE OF FLORIDA,**

*APPELLANT/CROSS-APPELLEE,*

*v.*

**LEO LOUIS KACZMAR, III,**

*APPELLEE/CROSS-APPELLANT.*

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

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**APPELLANT/CROSS-APPELLEE'S INITIAL BRIEF**

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## **INTRODUCTION**

Leo Kaczmar killed Maria Ruiz by stabbing her nearly a hundred times on December 13, 2008. In 2013, after this Court vacated Kaczmar's first death sentence, a jury unanimously recommended death. The sentencing court imposed a death sentence after finding the heinous, atrocious, or cruel (HAC) and prior violent felony aggravators. Kaczmar presented almost no mitigation because he *wanted* a death sentence.

Below, the postconviction court found that Kaczmar's counsel ineffective for failing to object and move for a new venire when, before jury selection, the resentencing judge told the venire that Kaczmar was previously sentenced to death. The jury was properly instructed at every other point and told that their recommendation must be based on the "evidence of the aggravating and mitigating circumstances" alone. The postconviction court found counsel ineffective and granted Kaczmar a *third* penalty phase.

This Court should reverse and find that any assumed deficiency did not prejudice Kaczmar in light of the overwhelming aggravation, paucity of mitigation, and presumption the jury followed the court's instructions.

## **ISSUE STATEMENT**

- I. Does a pre-penalty-phase-jury-selection comment by a judge that the defendant was previously sentenced to death result in *Strickland* prejudice when the jury was properly instructed their recommendation must be based on the aggravating and mitigating circumstances alone, the State proved two weighty aggravators, and the defendant chose to offer essentially no mitigation against counsel's advice?

## **RECORD CITATIONS**

The record below will be cited as "R." and then the page number, i.e., "(R. at 1.)" The record on appeal from Kaczmar's resentencing (SC13-2247) will be cited as RS and then the page number, i.e., "(RS at 1.)" The direct-appeal record (SC10-2269) will be cited as DA, volume number, and page number, i.e., "(DA Vol. 1 at 1.)"

## **STATEMENT OF THE CASE AND FACTS**

### I. STATEMENT OF THE CASE

A jury convicted Kaczmar of first-degree murder, attempted sexual battery, and arson, and recommended a capital sentence by an 11 to 1 vote. *Kaczmar v. State*, 104 So. 3d 990, 995 (Fla. 2012) (*Kaczmar I*). This Court vacated Kaczmar's sexual battery conviction and capital sentence and remanded for a new penalty phase while rejecting his other guilt-phase claims. *Id.* at 1002, 1008.

The circuit court held the jury portion of Kaczmar's second penalty phase on August 19–20, 2013. (RS at 617-1107.) Kaczmar waived all mitigation except his age and any mitigation from the guilt phase. *Kaczmar v. State*, 228 So. 3d 1, 6 (Fla. 2017) (plurality opinion) (*Kaczmar II*). The jury unanimously recommended a capital sentence, which the court imposed after finding the State proved the heinous, atrocious, or cruel, and prior violent felony aggravators beyond reasonable doubt. *Id.* This Court affirmed Kaczmar's capital sentence after finding any *Hurst*<sup>1</sup> error harmless. *Id.* at 7-15. On rehearing, this Court declined to address a potential error in the resentencing court telling the venire that Kaczmar was previously sentenced to death without prejudicing Kaczmar's ability to raise it later. *Kaczmar v. State*, No. SC13-2247, 2017 WL 4684336, at \*1 (Fla. Oct. 19, 2017).

Kaczmar filed his operative Florida Rule of Criminal Procedure 3.851 motion on May 25, 2019. (R. at 424-515.) This motion raised (as part of Claim 17) a subclaim that trial counsel ineffectively failed to object and move to strike the venire when the jury was told

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<sup>1</sup> *Hurst v. Florida*, 577 U.S. 92 (2016).

Kaczmar was previously sentenced “to life -- to death.” (R. at 467, 69-72.) The postconviction court granted a hearing on this claim and both parties addressed it in post evidentiary hearing memoranda. (R. at 980, 1692-96, 1771-77.)

On November 3, 2022, the postconviction court granted Kaczmar a new penalty phase after finding counsel were ineffective on this issue. (R. at 1814-17.) The State timely appealed on November 9, 2022, and Kaczmar cross-appealed the next day. (R. at 2226-29).

## II. STATEMENT OF THE FACTS

### **A. Trial Evidence/Direct Appeal**

This Court recited the overwhelming evidence against Kaczmar on direct appeal. *Kaczmar I*, 104 So. 3d at 995-97. This evidence included: (1) a neighbor hearing Kaczmar loudly screaming/swearing around 5:00/5:30 a.m.; (2) pictures/video surveillance showing Kaczmar buying \$2 of gas from a gas station less than a mile from his house at 5:59 a.m.;<sup>2</sup> (3) Kaczmar’s wife’s trial identification of Kaczmar as the one in the pictures/surveillance; (4) a tight timeline where two witnesses drove by Kaczmar’s intact house around 6:00

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<sup>2</sup> (DA Vol. 15 at 526–28; Vol. 16 at 630–34, 645.)

a.m., found it ablaze less than ten minutes later, and reported the fire;<sup>3</sup> (5) a forensic determination the arsonist used gasoline to set the house on fire; (6) Kaczmar's statements to law enforcement that he left his home around 2:00 - 3:00 a.m. to go fishing and arrived at his fishing spot around 3:45 a.m.;<sup>4</sup> (7) cuts on Kaczmar's hands;<sup>5</sup> (8) cell phone records showing Kaczmar actually left his home area around 6:26 a.m. and went towards Jacksonville (and his supposed fishing location) then; (9) the victim's blood on his socks; and (10) testimony from William Filancia (Kaczmar's cellmate) that Kaczmar confessed three times and admitted he tried to invent the fishing alibi. *Kaczmar I*, 104 So. 3d at 996–97.

This Court affirmed Kaczmar's first-degree murder conviction while vacating his capital sentence and remanding for a new penalty phase over a dissent from Justices Polston and Canady. *Id.* at 1008.

### **B. 2013 Resentencing**

Counsel Shea and Anderson, two extremely experienced defense attorneys who have never been held ineffective by any appellate

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<sup>3</sup> (DA Vol. 14 at 287–92, 298; Vol. 16 at 640.)

<sup>4</sup> (DA Vol. 14 at 352; Vol. 15 at 550–52, 572, 582, 587–590.)

<sup>5</sup> (DA Vol. 14 at 374; Vol. 15 at 551.)

court, represented Kaczmar at his resentencing. (R. at 2667-68, 2773-75, 2801-02, 2822-25.)

The jury portion of Kaczmar's operative penalty-phase began on August 19, 2013, and went through August 20, 2013. (RS at 617-1107.) Kaczmar refused a life offer from the State and to put on mitigation because he wanted a capital sentence in order receive maximum review of his convictions in both state and federal court. (RS at 573-76, 1115-26.) He eventually agreed to let counsel argue his age and any mitigation from the guilt phase, but otherwise confirmed his mitigation waiver. (RS at 1039-42.)

#### 1. Life Offer and Mitigation Refusal

In preparation for Kaczmar's second penalty phase, the resentencing court held a hearing on July 26, 2013. (RS at 570.) Kaczmar personally stated he would not take a life-sentence offer from the State because he wanted to maximize his conviction-related challenges in state and federal court. (RS at 573-76.) Kaczmar's strategy was against counsel's advice. (RS at 576.) Kaczmar also stated he did not want mitigation witnesses at his penalty phase. (RS at 578.) On August 5, 2013, counsel stated that Kaczmar refused to have live witnesses testify at his penalty phase and that a colloquy

might be necessary. (RS at 601, 613.)

## 2. Koon<sup>6</sup> Hearing

On August 8, 2013, the [resentencing] court held a *Koon* hearing, at which Kaczmar waived his right to present mitigation against his counsel's advice, including the presentation of any live mitigation witnesses or the testimony of the mitigation witnesses from the first penalty phase read into the record.

*Kaczmar II*, 228 So. 3d at 6; RS at 1110-42.

## 3. Pre-Jury-Selection Comment

The resentencing court held penalty-phase jury selection on August 19, 2013, and made the following statement after the prospective jurors entered the courtroom:

Be seated, please. All right. Good morning, ladies and gentlemen. My name is William Wilkes, and I'm the Judge that will be handling this case. This case has a little history to it so let me explain your duty today. It's different than most trials we ever have.

The defendant was found guilty of murder in the first degree on 8/12/10, sentenced on 11/5/10 *to life -- to death in this case*. Anyway, the Supreme Court always reviews any type of death case so the case went to the state Supreme Court, Florida State Supreme Court. They affirmed his conviction, that is they confirmed his conviction for the first-degree murder. However, the Supreme Court sent the case back here with instructions that the defendant is to have a new trial to decide what sentence should be imposed.

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<sup>6</sup> *Koon v. Dugger*, 619 So. 2d 246 (Fla. 1993).

(RS at 622-23) (emphasis added). No one objected.

#### 4. Jury Selection Voir Dire

The judge, State, and defense counsel then spent the next 169 pages questioning the venire and settling on twelve jurors and an alternate. (RS at 623-792.) These thirteen individuals were sworn<sup>7</sup> as Kaczmar's penalty phase jury. (RS at 792.)

During jury selection, the prosecutor informed the jury:

So as the Court indicated the defendant in this case has been found guilty already of first degree murder. An Appellate Court has reviewed that and affirmed that conviction. So that is settled. However, that same Appellate Court sent the case back with instructions to conduct a new penalty phase where a new recommendation would be received from a new jury and then the Judge would decide the sentencing.

(RS at 678-79.)

#### 5. Opening Arguments

The prosecutor's opening argument recounted Kaczmar's crime and the two aggravators he intended to prove: HAC and prior violent

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<sup>7</sup> Florida Rule of Criminal Procedure 3.360 sets out the oath jurors must take when being sworn as follows: "Do you solemnly swear (or affirm) that you will well and truly try the issues between the State of Florida and the defendant and render a true verdict according to the law and the evidence, so help you God?"

felony. (RS at 795-808.) Counsel Anderson's opening argued that life meant life in Florida, emphasized how important it was that the jury was attentive and followed the instructions they were given, and that the sentencing judge would give their recommendation great weight. (RS at 808-13.) He also argued he expected to prove five mitigators: (1) that Kaczmar was under the influence of extreme mental or emotional disturbance; (2) that Kaczmar's ability to appreciate the criminality of his conduct or conform his conduct to the requirements of law was substantially impaired; (3) that he was relatively young; (4) that he was respectful in court; (5) that his "co-suspect" Modlin got a lighter sentence. (RS at 813-14.)

#### 6. Prior Violent Felony Evidence

The State and Kaczmar stipulated that Kaczmar was convicted of a prior violent felony (a robbery) with the following underlying facts:

[T]he robbery the defendant was convicted of involved the defendant and a co-defendant. The defendant and co-defendant repeatedly struck and kicked the victim about the head and then forcefully took his jewelry and wallet for themselves against the victim's will. The defendant was 17 years of age at the time of the offense that was committed which was on March 22, 2001 but was charged and sentenced as an adult.

(RS at 815-16.)

## 7. HAC Evidence

Kaczmar's jury heard the following live testimony supporting the HAC aggravator from a medical examiner: (1) there were five cuts in the back of the victim's jacket/body and one to her upper right chest area (RS at 976, 988-89); (2) there was no alcohol or drugs found in the victim's system (RS at 982); (3) the victim "bled to death from multiple stabs" including to her neck (RS at 982-83); (4) the victim's numerous wounds were labeled from "A through quadruple O" on the pictures provided (RS at 983-84); (6) the victim had "two wounds" on the scalp that went "into the outside of the bone of the skull" from hard stabs (RS at 984-85, 997-98); (7) the victim had "multiple" defensive "wounds" on "the fingers and hands and wrists" and upper arm, including one that went entirely through her thumb (RS at 985, 989-91, 1000-01); (8) the victim had nonfatal wounds on her cheekbone, eyebrow, and forehead that, in combination with other nonfatal wounds, could have helped her bleed to death (RS at 985-86); (9) the victim had stab wounds "in front of her ear" and others that "went down her face" (RS at 986); (10) some of the cuts would have "severe[d] nerves and cause[d] a lot of pain" (RS at 986); (11) the victim had stab wounds that pierced the soft tissue of her

“cheek” (RS at 987); (12) a slash across her jaw area went “all the way down to the bone” and exposed the victim’s “jawbone” but (while painful) was nonfatal in isolation (RS at 987-88); (13) the victim had stab wounds in her neck, collarbone, and chest (RS at 988); (14) the victim suffered approximately “93” sharp force injuries to her body consistent with a “single-edged long slender blade” (RS at 991-92); (15) the victim also had blunt force injuries to her “right face, the left chest, the right forearm, and the left elbow” (RS at 993-94); (16) the victim suffered eleven stabs/slashes to her neck that were fatal; two of her major arteries were cut in three places (RS at 994-95); (17) the victim’s larynx was severed all the way through, her esophagus was almost completely severed, and five stab wounds pierced her right lung (RS at 995-96); (18) the victim’s major wounds occurred toward the end of a prolonged attack while her defensive wounds came earlier (RS at 999-1000, 1004); (19) it was “pretty obvious” the victim “put up quite a fight for her life” (RS at 1001-02). The jury was provided pictures of the victim’s injuries. (E.g., RS at 983-84.) The jury also heard that Kaczmar was part of a heated argument around 5:00-5:30 a.m., hours before the victim was discovered in the house. (RS at 828-31).

## 8. Defense Case

Kaczmar confirmed he waived all mitigation except his age and any guilt-phase mitigation before the defense began their penalty-phase case. (RS at 1040-42.) The sole defense evidence presented in mitigation was a stipulation that Kaczmar was 24 (nearly 25) when the crime occurred. (RS at 1066.)

## 9. Closing Arguments

The prosecutor's closing argument focused on the HAC and prior violent felony aggravators, minimal mitigation presented by Kaczmar, and urged the jury to sentence Kaczmar to death. (RS at 1051-62.)

Defense counsel argued the following in closing: (1) the jury should show mercy; (2) life without the possibility of parole was a just sentence in this case; (3) the prior violent felony aggravator had been established, but shouldn't be given much weight; (4) the State failed to show the murder was heinous, atrocious, or cruel; (5) Kaczmar was under the influence of drugs at the time of the murder. (RS. at 1065-74.) Separately, counsel urged the jury to find the following seven mitigating circumstances: (1) Kaczmar committed the murder while under extreme mental or emotional disturbance; (2) his

capacity to appreciate the criminality of his conduct or conform his actions to law was substantially impaired; (3) Kaczmar was only 24 at the time of the crime; (4) he was impaired by illegal drugs; (5) Kaczmar behaved respectfully in court; (6) another suspect in the case—Christopher Modlin—only got two years in prison; (7) Kaczmar is a loving father. (RS at 1074–1078.)

#### 10. Final Jury Instructions

The court then instructed the jury as follows:

All right. Ladies and gentlemen of the jury, the defendant has been found guilty of murder in the first degree. *An Appellate Court has reviewed and affirmed the defendant's conviction. However, the Appellate Court sent the case back to this Court with the instruction that the defendant is to have a new trial to decide what sentence should be imposed.*

Consequently, you will not concern yourselves with the question of his guilt. The punishment for this crime is either death or life imprisonment without the possibility of parole. The final decision as to which punishment shall be imposed rests with the Judge of this Court. However, the law requires that you, the jury, render to the Court an advisory sentence as to which punishment should be imposed upon the defendant.

It is now your duty to advise the Court as to the punishment that should be imposed upon the defendant for the crime of first degree murder. *You must follow the law that will now be given to and render an advisory sentence based on your determination as to which sufficient aggravating circumstance exists to justify the imposition of*

*the death penalty or whether sufficient mitigating circumstances exist that outweigh any aggravating circumstances found to exist.*

.....

*Your advisory sentence should be based on the evidence of the aggravating and mitigating circumstances that has been presented to you in these proceedings.*

.....

*You must follow the law as it is set out in these instructions. If you fail to follow the law your recommendation will be a miscarriage of justice. There's no reason for failing to follow the law in this case. All of us are depending upon you to make a wise and legal decision in this matter.*

*Your recommendation must be decided only upon the evidence published [sic] you have heard from the testimony of the witnesses, have seen in the form of exhibits in evidence and these instructions.*

.....

*It is to the evidence introduced during this proceeding and to it alone that you're to look for [proof of aggravating circumstances].*

.....

*The aggravating circumstances that you may consider are limited to any of the following that you find is established by the evidence [prior violent felony and heinous, atrocious, or cruel].*

.....

*Your recommendation must be based on the evidence and on the law contained in these instructions.*

. . . .

*The sentence that you . . . recommend to the Court must be based on the facts that you find them [sic] from the evidence and law.*

(RS at 1081–82, 1085-88, 1091) (emphases added). The written jury instructions mirrored the trial court’s oral instructions and included no reference to Kaczmar’s prior death sentence. (RS at 164-68.)

#### 11. Jury Recommendation

The jury began its deliberations at 1:15 p.m. and unanimously recommended death an hour and seventeen minutes later. (RS at 1095, 1097-1099.)

#### 12. Sentencing

The court sentenced Kaczmar to death on October 11, 2013, and issued a detailed, written sentencing order. (RS at 493–516, 587–94.) The court determined that the State had proven both the prior violent felony and heinous, atrocious, or cruel aggravators and gave both great weight. (RS. at 498–502.) The court rejected all mitigation argued at the jury portion of Kaczmar’s penalty-phase except for his impairment by drugs the night of the murder and respectful behavior

in court (both of which received slight weight) and found a dozen others proven from the non-jury *Spencer*<sup>8</sup> hearing. See *Kaczmar II*, 228 So. 3d at \*6-7 & n.7, 12; RS at 502–15.

### **C. Pre-Jury-Selection-Comment Claim in Postconviction**

Kaczmar filed his operative Rule 3.851 motion on May 25, 2019. (R. at 424-515.) This motion raised (as part of Claim 17) a subclaim that trial counsel ineffectively failed to object and move to strike the venire when the jury was told Kaczmar was previously sentenced “to life -- to death.” (R. at 467, 69-72.) The postconviction court granted a hearing on this claim. (R. at 980.)

### **D. Evidentiary Hearing Below**

Melanie Simpkins, the court reporter in Kaczmar’s resentencing, used the -- symbol frequently, and in different ways. (See RS at 617, 817.) She used it when the speaker was cut off. (E.g., RS at 605, 621.) She used it when the speaker changed their thought. (E.g., RS at 610, 620.) She used it when the speaker stumbled and resumed the same thought. (E.g., RS at 611, 621, 624, 638, 690.) She used it when the speaker paused and asked for clarification. (E.g., RS at 666.) And on at least one occasion, she seemed to use it

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<sup>8</sup> *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

to fill in for a missing word. (E.g., RS at 657.)

All three of the attorneys (both defense counsel and now-Judge Colaw, the former prosecutor) testified that they did not understand the resentencing judge's remarks as telling the jury that Kaczmar had previously been sentenced to death. (R. at 2764-65, 2803-04, 2957-60.) Ms. Simpkins testified that the resentencing judge tended to mumble/be difficult to hear. (R. at 2935.) The use of dashes in her transcripts could simply mean the judge "stumbled when he said 'to life -- to death'" and she did not use them to fill in missing words. (R. at 2935-36.) While Ms. Simpkins initially stated that she believed the judge told the jury Kaczmar had been sentenced to death before, she later clarified that she had no idea "what he was telling the jury," and she just wrote the words "to life to death" down. (R. at 2936.) She believed the statement could have gone either way. (R. at 2936.)

### **E. Postconviction Court's Ruling**

Both parties addressed Claim 17 in closing memoranda. (R. at 1692-96, 1771-77.) The State specifically argued the postconviction court should find no prejudice because of the presumption the jurors followed the resentencing court's instructions, the never-repeated nature of the resentencing judge's comment, and the incredibly

strong aggravation and lack of mitigation in this case. (R. at 1692-96.)

The postconviction court issued a written order granting relief on part of Claim 17 while denying all other relief. (R. at 1779-1832.) The court found that counsel was deficient, and Kaczmar was prejudiced, when counsel failed to object and request a new venire for jury selection after the resentencing judge told the jury that Kaczmar was previously sentenced to death. (R. at 1814-17.)

This is the State's Initial Brief.

## **SUMMARY OF THE ARGUMENT**

The postconviction court incorrectly found Kaczmar's counsel ineffective for failing to object and request a new venire for jury selection when the judge told the jury that Kaczmar was previously sentenced "to life – to death." Even assuming deficient performance, Kaczmar was not prejudiced for three independent reasons.

First, the court instructed the jury to base their decision exclusively on the evidence alone and they are (under *Strickland*) conclusively presumed to have followed that instruction. The postconviction court's prejudice holding requires speculation the jury disregarded their oath and recommended a capital sentence because they were previously informed Kaczmar was sentenced to death instead of based on the aggravating and mitigating circumstances. *Strickland* explicitly precludes this type of analysis.

Second, this single-offhand comment occurred once prior to jury selection and was *never* repeated. There is no reasonable probability that Kaczmar was prejudiced in light of this never-repeated comment. This Court has, on direct appeal, held more significant references to a prior capital sentence than below are harmless. Therefore, Kaczmar was not prejudiced.

Third and finally, there was abundant aggravation and practically no mitigation in Kaczmar's case. The State proved two of the weightiest aggravators known to Florida's capital system and Kaczmar (because he *wanted* a death sentence) provided essentially no mitigation. There is no reasonable probability the jury would have issued a life recommendation if the judge had not made the "to life - to death" statement.

For any or all of these reasons, this Court should find Kaczmar was not prejudiced by his counsel's failure to object and move for a new venire and reverse the postconviction court's grant of a new penalty phase.

## **ARGUMENT**

THE POSTCONVICTION COURT INCORRECTLY HELD COUNSEL INEFFECTIVE FOR FAILING TO OBJECT AND REQUEST A NEW VENIRE WHEN THE JUDGE TOLD THE VENIRE THAT KACZMAR WAS PREVIOUSLY SENTENCED “TO LIFE -- TO DEATH” BECAUSE KACZMAR SUFFERED NO PREJUDICE UNDER *STRICKLAND*.

### **A. Background**

Kaczmar’s second penalty phase jury unanimously recommended death after hearing he was previously convicted of a prior violent felony and stabbed the victim nearly a hundred times during a prolonged attack where she valiantly fought for her life. The jury was instructed to base its recommendation exclusively on the evidence before it and admonished that failing to follow the court’s instructions would result in a miscarriage of justice.

The postconviction court granted Kaczmar a third penalty phase based on speculation that the resentencing judge’s pre-jury-selection comment that Kaczmar was previously sentenced to death tainted the jury to the point that they would violate their oath and recommend death on that basis instead of on a careful assessment of the aggravating and mitigating circumstances. This analysis fails to account for *Strickland*’s prejudice-related presumption that juries follow their instructions, the never-repeated nature of this comment,

the fact that the State proved two of the weightiest aggravators known to Florida's capital sentencing system, and the fact that Kaczmar offered essentially no mitigation (because he *wanted* a death sentence). The postconviction court's prejudice determination is legally erroneous, and its grant of a new penalty phase based on ineffective assistance of counsel should therefore be reversed by this Court.

### **B. Standard of Review**

This Court reviews a lower court's prejudice determination de novo while deferring to its factual findings under the competent, substantial evidence standard. *State v. Mullens*, No. SC19-1587, 2022 WL 3904326, at \*4 (Fla. Aug. 31, 2022). The State's Initial Brief exclusively challenges the lower court's legal determination on prejudice and, therefore, the only applicable standard for this Court is de novo. *See id.*

### **C. Preservation**

The State preserved all arguments presented in this brief below. (See R. at 1692-96.)

### **D. Merits**

The Sixth Amendment to the United States Constitution gives

criminal defendants the right to the “Assistance of Counsel for his defence.” U.S. Const. amend. VI. This “right to counsel is the right to the effective assistance of counsel.” *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970). A defendant may therefore claim “counsel’s assistance was so defective as to require reversal of a conviction or death sentence.” *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

The Supreme Court established the standards governing ineffective assistance of counsel claims in *Strickland*. *Id.* at 686-701. These claims require the defendant to show both that counsel’s “performance was deficient” and that he was prejudiced by that deficiency. *Id.* A defendant’s failure to prove either the deficient performance or prejudice prong requires rejection of an ineffective assistance of counsel claim. *Hayward v. State*, 183 So. 3d 286, 297 (Fla. 2015). Since the “object of an ineffectiveness claim is not to grade counsel’s performance,” if “it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed.” *Strickland*, 466 U.S. at 697. *See also Branch v. State*, 952 So. 2d 470, 477 (Fla. 2006).

The Supreme Court provided extensive guidance on how to apply *Strickland*’s prejudice prong while deciding ineffective

assistance of counsel claims. *Strickland*, 466 U.S. at 694-96, 699-700. Prejudice requires showing a reasonable probability that “the result of the proceeding would have been different” had counsel performed adequately. *Id.* at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694. Speculation is not enough, and the likelihood of a different result must be “substantial, not just conceivable.” *Harrington v. Richter*, 562 U.S. 86, 112 (2011); *Derrick v. State*, 983 So. 2d 443, 462 (Fla. 2008). But the reasonable probability standard is lower than a preponderance of the evidence standard. *Woodford v. Visciotti*, 537 U.S. 19, 22 (2002).

“When a defendant challenges a death sentence” the prejudice “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.” *Id.* Because this is an objective inquiry, the number of decisionmakers does not matter in determining prejudice. *Bertolotti v. Dugger*, 883 F.2d 1503, 1519 n.12 (11th Cir. 1989). The stronger the evidence supporting a capital sentence, the harder it is for a defendant to prove prejudice. *Strickland*, 466 U.S. 695-96. Significant aggravating

factors are “difficult to overcome” when a defendant argues a deficiency prejudiced his penalty phase. *Suggs v. McNeil*, 609 F.3d 1218, 1232 (11th Cir. 2010).

The Supreme Court also established presumptions that apply when determining whether a defendant proved prejudice. Absent “challenge to the judgment on grounds of evidentiary insufficiency” courts must assume “that the judge or jury acted according to law.” *Strickland*, 466 U.S. at 695. “The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision.” *Id.*<sup>9</sup> See also *Downs v. State*, 453 So. 2d 1102, 1108 (Fla. 1984) (“In deciding whether the defendant has proved prejudice, a court should presume that the judge or jury acted according to the law.”); *Allen v. Sec’y, Fla. Dept. of Corr.*, 611 F.3d 740, 756 (11th Cir. 2010) (rejecting the argument that the court should “imagine the

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<sup>9</sup> *Strickland*’s prejudice test derives from the materiality prong used when the prosecution suppresses evidence. *Strickland*, 466 U.S. at 694. In the most famous prosecutorial suppression case, the Supreme Court explicitly rejected a “sporting theory of justice” that assumed the jury might have violated a judge’s ruling and instructions when evaluating materiality. *Brady v. Maryland*, 373 U.S. 83, 90–91 (1963). So, it is no surprise *Strickland*’s prejudice analysis presumes law-abiding jurors rather than lawless ones.

visceral response of the jury to a” victim-blaming defense as part of its prejudice analysis). Because of the objective—rather than subjective—nature of the prejudice inquiry “evidence about the actual process of decision, if not part of the record of the proceeding under review” should “not be considered in the prejudice determination.” *Strickland*, 466 U.S. at 695.

In its most refined form, *Strickland*’s penalty phase prejudice inquiry asks whether there is a reasonable probability that an objectively reasonable jury would have returned a life recommendation had counsel performed adequately. The lower court failed to correctly apply *Strickland*’s prejudice prong when it held counsel’s failure to object and move for a new venire after the resentencing judge told the prospective jurors that Kaczmar was previously sentenced to death resulted in Sixth Amendment prejudice. The judge’s comments would simply have had no effect on an objectively reasonable jury. This Court should reverse this legally erroneous prejudice ruling for three alternative reasons.

First, *Strickland*’s prejudice analysis requires presuming the jurors followed the resentencing court’s instructions and based their recommendation exclusively on a careful assessment of the

aggravating and mitigating circumstances. Second, the judge's single comment occurred before jury selection and was *never* repeated. Third, Kaczmar suffered no prejudice since the State proved two of the weightiest aggravators in Florida's capital system and he adduced essentially no mitigation. Since Kaczmar was clearly not prejudiced, this Court need not make any findings on *Strickland's* performance prong before reversing. *E.g., Hayward*, 183 So. 3d at 297.<sup>10</sup>

**1. Kaczmar Suffered No Prejudice Because *Strickland* Requires this Court to Presume the Jury Followed the Resentencing Court's Instructions and Recommended Death Based on the Aggravating and Mitigating Circumstances Rather than by Violating their Oath.**

*Strickland's* prejudice analysis requires this Court to presume that Kaczmar's 2013 resentencing jury was "reasonably, conscientiously, and impartially applying the standards that govern[ed]" their death recommendation and "acted according to law." *See Strickland*, 466 U.S. at 694. *See also United States v. Olano*,

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<sup>10</sup> The State also disagrees with the lower court's deficiency analysis, *cf. Brown v. State*, 846 So. 2d 1114, 1122 (Fla. 2003) (holding trial counsel not deficient for failing to make minor objections), but has strategically chosen not to attack the deficient performance holding since the lack of prejudice analysis is so straightforward and dispositive.

507 U.S. 725, 740 (1993) (recognizing the invariable presumption jurors follow the law is well-established, including for *Strickland* purposes). Both this Court<sup>11</sup> and the Eleventh Circuit<sup>12</sup> have long applied *Strickland*'s prejudice prong this way and assumed the jury abided by their oath and the instructions the court gave.

For example, this Court held that the presumption jurors follow

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<sup>11</sup> *Sanders v. State*, 946 So. 2d 953, 956-60 (Fla. 2006).

<sup>12</sup> *Smith v. Pulaski SP Warden*, 809 F. Appx. 712, 718 (11th Cir. 2020) (holding a defendant could not establish *Strickland* prejudice for failing to object and request a curative instruction on closing arguments because “although the trial court did not issue a specific curative instruction, it did instruct the jury that closing arguments do not constitute evidence, and we presume a jury will follow the instructions given to it”); *Crapser v. Sec’y, Dept. of Corr.*, 855 F. Appx. 626, 628 (11th Cir. 2021) (“*Strickland* requires that we assume the jury in Crapser’s trial followed this rule of law.”); *Allen v. Sec’y, Fla. Dept. of Corr.*, 611 F.3d 740, 756 (11th Cir. 2010) (rejecting the argument that the court should “imagine the visceral response of the jury to a” victim-blaming defense as part of its prejudice analysis); *Putman v. Head*, 268 F.3d 1223, 1249 (11th Cir. 2001) (*Strickland* requires a presumption the jury followed the instructions they were given); *Brown v. Jones*, 255 F.3d 1273, 1279–80 (11th Cir. 2001) (holding the defendant could not demonstrate prejudice because of the presumption the jury followed court instructions); *Collier v. Turpin*, 177 F.3d 1184, 1203 (11th Cir. 1999) (“We must therefore assume that the jurors could put aside their passions and render a sentence based upon the aggravating and mitigating circumstances of the case as presented to them.”). *See also United States v. Roy*, 855 F.3d 1133, 1185–88 (11th Cir. 2017) (en banc) (explaining the importance of the presumption that juries follow instructions, including in the *Strickland* context).

the law precluded a prejudice analysis that would have required them to violate their oath. *Sanders*, 946 So. 2d at 956. In *Sanders*, this Court dealt with whether *Strickland* prejudice could flow from the failure to instruct the jury on lesser included offenses and give them an opportunity to exercise their pardon power. *Id.* at 956-60. This Court recognized that “any finding of prejudice resulting from defense counsel’s failure to request an instruction on lesser-included offenses necessarily would be based on a faulty premise: that a reasonable probability exists that, if given the choice, a jury would violate its oath, disregard the law, and ignore the trial court’s instructions.” *Id.* at 956. Therefore, “a defendant cannot, as a matter of law, demonstrate prejudice by relying on the possibility of a jury pardon, which by definition assumes that the jury would have disregarded the law, the trial court’s instructions, and the evidence presented.” *Id.* See also *Crapser v. Sec’y, Dept. of Corr.*, 855 F. Appx. 626, 627-29 (11th Cir. 2021) (holding *Sanders* is a reasonable application of the Supreme Court’s clearly established law).

Likewise, the Eleventh Circuit held that a defendant’s attempt to show prejudice stemming from a victim-blaming defense failed due to the instructions the jury received. *Allen*, 611 F.3d at 754. In *Allen*,

defense counsel suggested that the victim may have committed suicide instead of being murdered. *Id.* at 754-56. On *Strickland's* prejudice prong, the defendant urged the court to “imagine the visceral response of the jury to a defense closing argument that the victim was responsible for her own death.” *Id.* at 756. But, citing *Strickland's* presumption that jurors follow court instructions, the Eleventh Circuit found this Court’s determination that the defendant suffered no prejudice was objectively reasonable. *Id.*<sup>13</sup>

Outside *Strickland*, the Supreme Court has held that the presumption jurors follow their instructions defeats a direct-appeal due process claim very similar to Kaczmar’s postconviction ineffective

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<sup>13</sup> *Strickland's* presumption that juries follow the court’s instructions does not always inure to the State’s benefit. See *Collier*, 177 F.3d at 1203. In *Collier*, the Eleventh Circuit rejected a no-prejudice holding that found the jury would be too inflamed to render anything other than a death sentence in a widely known, officer-murder case. *Id.* The district court could not take “into account the righteous anger of the” local “jurors” when deciding whether the defendant was prejudiced because “such considerations run afoul of *Strickland.*” *Id.* Instead, the court was required to presume “that the jurors could put aside their passions and render a sentence based upon the aggravating and mitigating circumstances of the case as presented to them.” *Id.* This presumption is necessary to isolate and objectively evaluate the reasonable consequences of counsel’s inadequacies instead of engaging in speculation. It also ensures ineffective assistance of *counsel* claims do not become judge/juror misconduct claims.

assistance of counsel claim. *See Romano v. Oklahoma*, 512 U.S. 1, 3 (1994). In *Romano*, the defendant murdered two individuals (Thompson and Sarfaty) a year apart. *Id.* He was convicted of the Thompson murder first and sentenced to death before he went to trial on the Sarfaty murder. *Id.* At the Sarfaty murder trial, a different jury found him guilty and sentenced him to death after learning (at sentencing) that he was previously sentenced to death for the Thompson murder. *Id.*

Before penalty-phase closing arguments, the resentencing court instructed the jury that it could not impose death unless it found an aggravating circumstance and that the aggravation outweighed the mitigation. *Id.* at 4-5. The jury imposed a capital sentence after finding four aggravating circumstances and that they outweighed the mitigation. *Id.* at 5. The defendant appealed from the Sarfaty judgment and, while that appeal was pending, his conviction and capital sentence for the Thompson murder was vacated by an appellate court. *Id.*

In the Supreme Court, the defendant argued that the admission of evidence that he had been previously sentenced to death violated the Eighth and Fourteenth Amendments. *Id.* at 3, 10. Specifically, on

his Fourteenth Amendment due process claim, the Supreme Court held the correct question was “whether the admission of evidence regarding petitioner’s prior death sentence so infected the sentencing proceeding with unfairness as to render the jury’s imposition of the death penalty a denial of due process.” *Id.* at 12.

As part of its due process analysis, the Supreme Court recognized that evidence of the defendant’s prior capital sentence was irrelevant under Oklahoma law. *Id.* at 13.

However, if the jurors followed the trial court’s instructions, *which we presume they did, this evidence should have had little—if any—effect on their deliberations.* Those instructions clearly and properly described the jurors’ paramount role in determining petitioner’s sentence, and they also *explicitly limited the jurors’ consideration of aggravating factors to the four which the State sought to prove.* Regardless of the evidence as to petitioner’s death sentence in the Thompson case, the jury had sufficient evidence to justify its conclusion that these four aggravating circumstances existed. Although one of the aggravating circumstances proved invalid when petitioner’s conviction for the Thompson murder was overturned on appeal, the other three remained untainted and still outweighed the mitigating circumstances. *In short, the instructions did not offer the jurors any means by which to give effect to the evidence of petitioner’s sentence in the Thompson murder, and the other relevant evidence presented by the State was sufficient to justify the imposition of the death sentence in this case.*

*Id.* at 13 (cleaned up; emphases added). In light of the presumption

the jury followed the court's instructions, and the reality the jury had no legal way to include the information about the Thompson capital sentence into their Sarfaty penalty-phase verdict, the Supreme Court rejected the defendant's due process claim.<sup>14</sup>

The Supreme Court also took issue with the contention that a jury hearing about a prior death sentence would make the jury more likely to sentence the defendant to death.

Even assuming that the jury disregarded the trial court's instructions and allowed the evidence of petitioner's prior death sentence to influence its decision, it is impossible to know how this evidence might have affected the jury. It seems equally plausible that the evidence could have made the jurors more inclined to impose a death sentence, or it could have made them less inclined to do so. Either conclusion necessarily rests upon one's intuition. To hold on the basis of this record that the admission of evidence relating to petitioner's sentence in the Thompson case rendered petitioner's sentencing proceeding for the Sarfaty murder fundamentally unfair would thus be an exercise in speculation, rather than reasoned judgment.

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<sup>14</sup> *Romano* is particularly significant because it was a direct-appeal case rather than a postconviction one, and defendants generally need to meet less onerous standards to secure reversal on direct appeal than postconviction. See, e.g., *Sanders*, 946 So. 2d at 959 (recognizing heightened standards for postconviction vs. direct-appeal relief); *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1911 (2017) (unpreserved structural error on direct appeal does not automatically require a presumption of prejudice in postconviction).

*Id.* at 13-14.

With this background in mind, the lower court erred as a matter of law because the correct prejudice analysis requires presuming the jury dutifully followed the instructions they were given. Kaczmar's jury was instructed: (1) they "must follow the law" in the instructions; (2) they must give a recommendation based on a careful assessment of the evidence supporting the aggravating and mitigating circumstances; (3) they were limited to HAC and prior violent felony when looking for aggravation; (4) their recommendation must be "decided only upon the evidence" published to them and the law in the final instructions; (5) failing to follow the final instructions would result in a "miscarriage of justice" and there is "no reason for failing to follow the law in this case." (RS at 1081-82, 1085-88, 1091).

A jury following these instructions would not have factored a pre-jury-selection comment by the resentencing judge that Kaczmar had been previously sentenced to death into their recommendation. That comment was neither evidence nor included in the instructions, which informed the jury they could only utilize the evidence presented in the penalty phase to arrive at their recommendation and were limited to HAC and prior violent felony for aggravation.

*Strickland*'s correct prejudice analysis requires presuming the jury followed these instructions. *See Strickland*, 466 U.S. at 694.

With that presumption in place, Kaczmar suffered no prejudice because his jury ignored the irrelevant, pre-jury-selection statement by the resentencing judge instead of violating their oath by utilizing it in their analysis. *See Brown v. Jones*, 255 F.3d 1273, 1279–80 (11th Cir. 2001) (“Because we presume that the jurors followed the court’s instructions to base their sentencing decision on the evidence and the law, and not on arbitrary factors, Brown’s attempt to prove prejudice is undermined.”). It is no more likely that the jury in this case would violate their oath than in *Sanders* or *Allen*. And as in *Romano*, “the instructions” which the jury is presumed to follow “did not offer the jurors any means by which to give effect to the” information about Kaczmar’s prior “sentence.” *See Romano*, 512 U.S. at 13.

At bottom, the lower court’s prejudice holding is an unsupported exercise in sheer speculation that the jury violated their oath and sentenced Kaczmar to death because they learned he was previously sentenced to death instead of based on a careful assessment of the aggravating and mitigating circumstances. “It is

improper to vacate a death sentence based on pure speculation of fundamental unfairness, rather than reasoned judgment.” *Kansas v. Carr*, 577 U.S. 108, 109 (2016) (cleaned up). Since the lower court’s prejudice holding requires (contrary to *Strickland*) speculating the jury violated their oath while sentencing Kaczmar to death, this Court should reverse and restore Kaczmar’s capital sentence.

**2. Kaczmar Also Suffered No Prejudice Because the Resentencing Judge’s Pre-Jury-Selection Comment Was Never Repeated.**

Kaczmar also suffered no prejudice because the resentencing judge’s minor, pre-jury-selection comment was never repeated. This Court has held that minor references to a prior death sentence are harmless on direct appeal. *Teffeteller v. State*, 495 So. 2d 744, 746–47 (Fla. 1986);<sup>15</sup> *see also Sireci v. State*, 587 So. 2d 450, 452 (Fla. 1991) (recognizing this Court in *Teffeteller* “found no error where the record reflected that the impact of merely mentioning a prior death sentence was negligible”).<sup>16</sup> *Teffeteller*’s holding is particularly salient

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<sup>15</sup> This Court has also held that references to a prior death sentence do not amount to fundamental error. *Lowe v. State*, 259 So. 3d 23, 48 (Fla. 2018).

<sup>16</sup> It is somewhat unclear whether *Teffeteller*’s first holding was that references to the prior capital sentence were harmless error or no

in this case because the standard for harmlessness on direct appeal is significantly more defense friendly than *Strickland's* prejudice prong. *See Sanders v. State*, 847 So. 2d 504, 506 (Fla. 1st DCA 2003) (en banc) (explaining that on direct appeal the burden is on the State to prove the preserved error did not affect the outcome while *Strickland* prejudice requires the defendant to prove a reasonable probability of a different outcome), *approved*, 946 So. 2d 953 (Fla. 2006).

In *Teffeteller*, this Court held that mentioning the defendant's prior capital sentence was harmless under the facts of that case. The defendant there claimed that "it was reversible error to inform the jury of his prior sentence of death." *Teffeteller*, 495 So. 2d at 745. While agreeing that "a death sentence which has been vacated by this Court should not play a significant role in resentencing proceedings," this Court held that the prejudicial effect of the resentencing jury knowing about the prior death sentence was "negligible." *Id.* at 745-

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error. But since (in its second holding) this Court referred to these references to the prior sentence as "errors" and held they were not fundamental, it appears this Court's first holding was that there was no *reversible* error because of the negligible prejudicial impact of the references (in other words, the error was harmless). *See Teffeteller*, 495 So. 2d at 745-47.

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This Court concluded the prejudicial effect of the jury knowing about the defendant's vacated capital sentence was negligible for two reasons: (1) the prior sentence was not a feature of the penalty phase; (2) there was no "mention of the prior *jury's* recommendation, only that a death sentence had been imposed by the original trial *judge*." *Teffeteller*, 495 So. 2d at 747 (emphasis in original).<sup>17</sup>

The same is true here. Kaczmar's prior sentence was mentioned once before jury selection, significantly less than the four allusions (three during penalty-phase evidence and one during closing argument) discussed by this Court in *Teffeteller*. 495 So. 2d at 745-47. This pre-jury-selection comment was brief, somewhat ambiguous, never repeated, and did not inform the jury about the prior jury's recommendation either. The impact of the judge's pre-jury-selection comment about Kaczmar's prior death sentence was thus even more negligible than the ones this Court found harmless in *Teffeteller*. As a result, Kaczmar cannot demonstrate prejudice. *See*

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<sup>17</sup> As a separate, independent reason to affirm, this Court held that any error was unpreserved and not fundamental. *Teffeteller*, 495 So. 2d at 747.

*Conde v. State*, 35 So. 3d 660, 664 (Fla. 2010) (harmless errors, definitionally, cannot result in *Strickland* prejudice). Therefore, this Court should reverse the lower court’s prejudice determination.

**3. Alternatively, Kaczmar Suffered No Prejudice Because the State Proved the Prior Violent Felony and Heinous, Atrocious, or Cruel Aggravators, while Kaczmar Provided Essentially No Mitigation Because He Wanted a Death Sentence.**

Setting everything else aside, the resentencing court’s allusion to Kaczmar’s prior sentence did not result in *Strickland* prejudice in light of the strength of the State’s aggravation and the intentional paucity of Kaczmar’s mitigation.

Since Kaczmar tied counsel’s hands when it came to mitigation (because he wanted a death sentence), even without *Strickland*’s presumptions, there is no reasonable probability of a different outcome. The State proved both “HAC and prior violent felony, two of the weightiest factors” in Florida’s capital system. *See Hall v. State*, 107 So. 3d 262, 278 (Fla. 2012); *Woodbury v. State*, 320 So. 3d 631, 653 (Fla. 2021). The HAC evidence was particularly compelling, showing the victim suffered nearly 100 knife wounds and put up “quite a fight for her life.” (RS at 976-1002).

By contrast, Kaczmar only argued the following mitigation

before the jury: (1) he committed the murder while under extreme mental or emotional disturbance; (2) his capacity to appreciate the criminality of his conduct or conform his actions to law was substantially impaired; (3) Kaczmar was only 24 at the time of the crime; (4) he was impaired by illegal drugs; (5) Kaczmar behaved respectfully in court; (6) another suspect in the case—Christopher Modlin—only got two years in prison (Kaczmar provided no support for this mitigator before the jury); (7) Kaczmar is a loving father (Kaczmar provided no support for this mitigator before the jury). (RS at 1074–1078.) Notably, the resentencing judge reasonably rejected all of this mitigation other than his drug impairment and that he was respectful in court. *Kaczmar II*, 228 So. 3d at \*6-7 & n.7. Any objectively reasonable judge/jury would have done the same given the lack of evidentiary support adduced at the jury portion of the penalty phase.

Based on the significant aggravating circumstances presented by the State, and intentional paucity of mitigation provided by Kaczmar, there is no reasonable probability that Kaczmar's jury would have returned a life recommendation but for the resentencing judge's pre-jury-selection comment. Kaczmar suffered no prejudice

under *Strickland* and his Sixth Amendment claim should have been rejected. He intentionally placed almost no mitigation before the jury in a deliberate ploy to receive a capital sentence. He can hardly claim he was prejudiced when his jury obliged and (quite reasonably based on the aggravating circumstances and lack of mitigation) recommended death. This Court should reverse and restore Kaczmar's capital sentence.

### **CONCLUSION**

Kaczmar's Sixth Amendment right to the effective assistance of counsel was not violated. He suffered no prejudice under *Strickland* when his counsel failed to object and move for a new venire after the resentencing judge mentioned Kaczmar was previously sentenced to death before jury selection. The resentencing judge's irrelevant comments would have had no impact on an objectively reasonable jury. Therefore, this Court should vacate the lower court's legally erroneous order and restore Kaczmar's wrongly vacated capital sentence instead of granting him a third penalty phase.

Respectfully submitted and certified,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 28th day of February, 2023, I electronically filed the foregoing with the Clerk of the Court by using the Florida Courts E-Portal Filing System which will send a notice of electronic filing to the following: Dawn Macready, Elizabeth Salerno and Elizabeth Spiaggi, Assistants CCRC-North, 1004 DeSoto Park Drive, Tallahassee, Florida 32301, **dawn.macready@ccrc-north.org**, **elizabeth.salerno@ccrc-north.org**, **elizabeth.spiaggi@ccrc-north.org**.

**CERTIFICATE OF COMPLIANCE**

I HEREBY CERTIFY that the size and style of type used in this brief is 14-point Bookman Old Style in compliance with Florida Rule of Appellate Procedure 9.045. This brief contains 8,295 words in

compliance with Florida Rule of Appellate Procedure 9.210(a)(2)(C),  
(a)(2)(E).

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