In the Supreme Court of Florida

RICHARD McCOY,

Appellant,

v. CASE NO. SC10-2206

STATE OF FLORIDA,

Appellee.
_____/

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

ANSWER BRIEF OF APPELLEE

PAMELA JO BONDI
ATTORNEY GENERAL

CHARMAINE M. MILLSAPS
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0989134

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL, PL-01
TALLAHASSEE, FL 32399-1050
(850) 414-3300
COUNSEL FOR THE STATE

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PRELIMINARY STATEMENT

Appellant, RICHARD McCOY, the defendant in the trial court, will be referred to as appellant, the defendant or by his proper name. Appellee, the State of Florida, will be referred to as the State. Pursuant to Rule 9.210(b), Fla. R. App. P. (1997), this brief will refer to a volume according to its respective designation within the Index to the Record on Appeal. A citation to a volume will be followed by any appropriate page number within the volume. The symbol "IB" will refer to appellant's initial brief and will be followed by any appropriate page number. All double underlined emphasis is supplied.

STATEMENT OF THE CASE AND FACTS

This is a postconviction appeal of a trial court's denial of an initial postconviction motion in a capital case. The facts of this case, as recited in the Florida Supreme Court's direct appeal opinion, are:

> On the morning of June 13, 2000, Shervie Ann Elliott was found dead in the storage room of the Jacksonville ABC Liquors store in which she worked, and $415 was missing from the store's two safes. The evidence adduced at the appellant's trial established that the victim had been shot once in the abdomen, a wound which disabled her; once in the neck, resulting in paralysis; and once in the face, the fatal wound. The store's surveillance tape showed the robbery and murder occurring from 8:20 a.m. to 8:33 a.m. on June 13. The initial investigation of the alcoholic beverage store performed by law enforcement officers and evidence technicians revealed no evidence of a physical struggle.
>
> Both circumstantial and direct evidence linked the appellant to the crime scene. Three latent fingerprints found on an ABC Liquors cash and receipt pouch within the non-public store office were matched to McCoy. While the latent fingerprint examiner could not form any conclusions regarding when the fingerprints were deposited on the pouch, ABC Liquors employees testified that the money pouches were kept within the store office at all times, and only store managers were involved with the pouches. Additionally, the store surveillance camera revealed that an African-American male had committed the robbery and murder.
>
> On June 19, ABC Liquors advertised a $10,000 reward for information leading to the arrest and conviction of the person who had robbed and murdered Elliott. The following day, Zsa Zsa Marcel contacted ABC Liquors and spoke with Teresa Johnson, the ABC Liquors regional manager for the Jacksonville area. Johnson directed Marcel to Dale Galbreath, the detective leading the Sheriff's Office investigation of the robbery and murder. She related to Galbreath that on June 14, her boyfriend,[1] Richard McCoy,[2] had told her that he had been involved in the armed

[1] Marcel was married to a different man throughout the relationship she had with McCoy.

[2] McCoy is also known as Jamil Rashid, the name he adopted upon Islamic conversion. For ease of presentation, we refer only to the appellant's birth name, Richard McCoy

> robbery of an ABC Liquors store in which a woman was killed. He had detailed to Marcel the manner in which he and his accomplice "rushed" the manager of the store as she opened the back door, forced her to turn off the alarm and video surveillance equipment, and made Elliott open the store's safes. Additionally, McCoy had told Marcel that the inside of the store was very dimly lit at the time of the robbery, his accomplice had actually shot the store manager, and he and his partner had netted $4,000 from the venture.
>
> Following her discussion with Galbreath, Marcel agreed to initiate a conversation with McCoy regarding the ABC Liquors robbery while wearing a recording device attached to her purse. Subsequently, she listened to the tape recording of her conversation with McCoy, agreed that it was a *400 fair and accurate depiction of their discussion that afternoon, and helped the State prepare a transcript of the conversation.

McCoy v. State, 853 So.2d 396, 399-400 (Fla. 2003)(footnotes included).

The procedural history as recited by the Florida Supreme Court in its direct appeal opinion is:

> On July 13, 2000, McCoy was indicted by a Duval County grand jury on charges of first-degree murder, armed burglary, and armed robbery.[3] In addition to the testimony of Marcel, the ABC Liquors employees, and law enforcement officers related above, McCoy's trial jury heard testimony during the guilt phase from the medical examiner, detailing the succession of the gunshot injuries sustained by Elliott, as well as her conclusion that the second and third gunshots fired by Elliott's attacker had been fired from a distance of between six and twelve inches from the victim's body.
>
> Following the trial court's denial of McCoy's motion for judgment of acquittal, the defense presented evidence in support of the appellant's claim that he was at the home of his girlfriend, Dorothy Small, on the morning of June 13, 2000. Sherry Cross, Small's neighbor and a Raven Transport long-haul truck driver, testified that she had spoken with McCoy for approximately five minutes outside her home on the morning of the thirteenth between 8:00 a.m. and 8:30 a.m. On cross examination, however, she admitted that she was estimating, and that the conversation could have taken place either after 8:30 a.m., or before 8 a.m. Cross's testimony was supported by the

[3] As McCoy does not contest his armed robbery conviction, and was not convicted of armed burglary, we address only the appellant's conviction and sentence for first-degree murder

testimony of the Raven Transport Director of Safety, William Weise, who testified that the company's satellite positioning system showed that Cross was in Jacksonville on the morning of June 13. Additionally, the defense presented the testimony of Dorothy Small, who related that after spending the night at her house, McCoy had left her home early on the morning of the 13th of June, and John Bailey, a Krystal Burger employee who testified that McCoy ate breakfast at his restaurant nearly every morning. Bailey could not, however, remember whether McCoy ate breakfast at Krystal Burger on the morning of June 13. The defense then called Clarence Williams, the father of a child with Zsa Zsa Marcel, who testified that Marcel had a reputation for dishonesty in their Louisiana community.

Finally, McCoy testified in his own defense. He testified that on the morning of June 13, 2000, he left Small's house at 6:45 a.m. and went home. He returned to Small's house at around 8 a.m. to take trash to the curb, and spoke with Cross at that time. After completion of this chore, McCoy went to Krystal Burger, ate breakfast, and then proceeded to an interview. He and Marcel had a relationship, and he knew that she was "tough"-she had confessed to him that she robbed a restaurant on June 10. McCoy testified that, therefore, he lied to her and claimed that he had robbed ABC Liquors, in an effort to impress her. He explained that his fingerprints were on the ABC Liquors receipt pouch because he had once found one of the pouches in another ABC store parking lot, and mailed it to ABC Liquors headquarters in Orlando.

In rebuttal, the State presented the testimony of Mark Bachara, a Jacksonville Sheriff's Office investigator assigned to the Office of the State Attorney, who stated that it takes six minutes to drive from Dorothy Small's home to the ABC Liquors store that was robbed on June 13, 2000. Following a renewed motion for judgment of acquittal, closing argument, and jury instruction, the jury found McCoy guilty of *401 premeditated first-degree murder. Additionally, the jury specifically found that "the killing was done during the commission or attempted commission of a robbery."

The State's presentation during the penalty phase consisted of the introduction of judgments and sentences detailing McCoy's prior convictions for three counts of armed robbery and one count of attempted armed robbery. Additionally, the State elicited testimony from Richard Hughes, McCoy's probation supervisor, to establish that the appellant was being supervised on conditional release at the time of the ABC Liquors robbery. Finally, the victim's sister and the victim's ABC Liquors supervisor testified regarding the impact of the victim's death upon their lives, and a statement written by the victim's son was read to the jury.

The defense presented the testimony of McCoy's mother and sisters, who detailed for the jury the troubled home life to which McCoy was exposed-physical abuse, inter-parental violence, and nearly abject poverty. Paul Gillians, Diane Peterson, and Trina Rivers testified regarding McCoy's respectful and caring nature, as well as instances in which he had performed good deeds, including his saving Paul Gillians from being burned to death. McCoy waived his right to testify during the penalty phase, and, following instruction and deliberation, the jury recommended imposition of the death penalty by a vote of seven to five.

The court held a subsequent *Spencer*[4] hearing, and followed the jury's recommendation, concluding that "on balance, the aggravating circumstances in this case far outweigh the mitigating circumstances." The trial court concluded that the following aggravators applied: (1) prior conviction of felonies involving the use or threat of violence; (2) the appellant was under a sentence of imprisonment or on community control at the time of the commission of the instant murder; (3) the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification (CCP); (4) the murder was committed for financial gain and was committed while engaged in the commission of the crime of armed robbery (aggravators merged); and (5) the murder was committed for the purpose of avoiding or preventing a lawful arrest (merged with CCP aggravator). The court found no statutory mitigators, but determined that twenty mitigating circumstances had been established.[5] Each of the mitigating factors was given "some weight" by the trial court.

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

[5] (1) The defendant suffered an abusive childhood; (2) the defendant suffered an emotionally deprived childhood; (3) the defendant suffered an economically deprived childhood; (4) the defendant's mother had relationships with different abusive and non-abusive males; (5) the defendant suffered from unstable living conditions in his childhood; (6) the defendant's parents' divorce at age ten devastated him; (7) the defendant received poor and inadequate medical care, particularly when he suffered from a high fever; (8) the defendant is a caring son to his mother, providing her food, renting movies for her, and spending time with her; (9) the defendant had a good relationship with his father; (10) the defendant was a caring brother to his sisters, Barbara McCoy and Dorothy McCoy Robertson; (11) the defendant was a caring parent, before his incarceration, to his two sons, Andre (age 17) and Kenny (age 15); (12) as a child, the defendant did poorly in school; (13) as a child, the defendant did not receive the psychological counseling recommended by school officials; (14) there is no evidence that the defendant has ever been violent or abusive in his personal

McCoy v. State, 853 So.2d 396, 400-402 (Fla. 2003).

On appeal to the Florida Supreme Court, McCoy raised seven issues: that the trial court erred in (1) admitting the audiotape conversation between McCoy and Marcel into evidence; (2) permitting the jury to view a transcript of the conversation between McCoy and Marcel; (3) denying McCoy's motions for judgment of acquittal made at the close of the State's case, as well as at the close of the evidence; (4) allowing Marcel to testify; (5) restricting the cross-examination of Marcel; and (6) finding that the instant murder was committed in a cold, calculated, and premeditated fashion. Finally, McCoy asserted that (7) the Florida death penalty scheme is unconstitutional. *McCoy*, 853 So.2d at 402, n.6 (listing issues in a footnote). The Florida Supreme Court affirmed the convictions for first-degree murder and armed robbery and the death sentence. McCoy did not seek certiorari review in the United States Supreme Court.

On June 23, 2004, registry counsel, Dale Westling, filed an initial motion for post-conviction relief raising three claims. On August 10, 2004, McCoy filed an amended initial motion. On March 1, 2005, after the appointment of private counsel, David Walter Collins, McCoy filed

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relationships with family members or friends; (15) the defendant is a member of the Muslim faith; (16) the defendant successfully held employment as a welder; (17) the defendant performed laudable humanitarian deeds for Paul Gillians, Diane Peterson, and Trina Rivers; (18) the defendant demonstrated good behavior during the trial after the verdict was rendered; (19) for the eleven months that he was on conditional release prior to the commission of this robbery and murder, the defendant apparently did well and complied with the requirements of conditional release; and (20) the defendant would die in prison regardless of the sentence imposed.

a second amended motion raising twenty (20) claims. The State agreed to an evidentiary hearing on claims 1(a); 1(b); 2(a); 2(d); 4; 5; 6; 8(a); 9; 10; 1; 12; 15; 16; and 22 but asserted that the remaining claims should be summarily denied. On September 20, 2006, the trial court conducted a *Huff* hearing.

On July 23, 2007, the trial court conducted an evidentiary hearing. Both parties submitted post-evidentiary hearing memorandums of law. On October 19, 2010, the trial court denied the amended 3.851 motion for post-conviction relief.

SUMMARY OF ARGUMENT

ISSUE I

McCoy asserts that his trial counsels, Chief Assistant Public Defender Alan Chipperfield and Assistant Public Defender Ronald P. Higbee, were ineffective for not presenting his mother, Josie McCoy, to testify that McCoy was at the family birthday party at the time Marcel claimed that McCoy confessed her. There was no deficient performance. McCoy's confession to Marcel was recorded as part of an undercover operation. McCoy admitted both at trial during his testimony and at the evidentiary hearing that the voice on the recording was his. Nor is there any prejudice. The State presented the undercover recording of McCoy's confession to Marcel. The trial court properly denied this claim following an evidentiary hearing on the matter.

ISSUE II

McCoy asserts that his trial attorneys, Chief Assistant Public Defender Alan Chipperfield and Assistant Public Defender Ronald P. Higbee, were ineffective for failing to object to religious references. McCoy asserts the trial counsel should have objected to the prosecutor's reference to God and to Ms. Wiley victim's impact testimony containing religious statements. There was no deficient performance. The prosecutor never referred to the defendant's faith. The prosecutor merely told the jury to use their God-given common sense which is not objectionable. The victim impact testimony was proper and therefore, not objectionable. Furthermore, there was

no prejudice. This trial and penalty phase occurred prior to the September 11th attacks. The trial court properly denied the claim of ineffectiveness.

ISSUE III

McCoy asserts that his trial counsels, Chief Assistant Public Defender Alan Chipperfield and Assistant Public Defender Ronald P. Higbee, were ineffective for conceding that a robbery had occurred. Counsel did not concede that McCoy was the perpetrator, only that a crime had occurred. As the trial court found, based on defense counsel's testimony that arguing that it wasn't a robbery would be a "weak" argument, there was no deficient performance. Nor was there any prejudice because the jury would have convicted McCoy of robbery with a firearm in a case where there was a videotape and testimony that money was missing regardless of counsel's "concession" that a robbery occurred. The trial court properly denied this claim of ineffectiveness following an evidentiary hearing.

ISSUE IV

McCoy asserts that his trial counsels, Chief Assistant Public Defender Alan Chipperfield and Assistant Public Defender Ronald P. Higbee, were ineffective for not advising him not to testify. McCoy claims that defense counsel did not prepare him to testify or warn him about cross-examination. The trial court found defense counsel's testimony at the evidentiary hearing that he discussed the decision to testify multiple times with the defendant more credible than the

defendant's testimony at the evidentiary hearing that counsel did not. Moreover, as the trial court also noted, the trial court itself warned McCoy about the dangers of testifying during the colloquy conducted prior to McCoy's testimony in the guilt phase. The trial court's colloquy specifically referenced cross-examination including McCoy's being cross-examined regarding his prior convictions. The trial court properly denied this claim of ineffectiveness following an evidentiary hearing on the matter.

ISSUE V

McCoy asserts that his trial counsels, Chief Assistant Public Defender Alan Chipperfield and Assistant Public Defender Ronald P. Higbee, were ineffective for failing to subpoena and present two of the victims of the Lee's Chicken robbery to identify state witness Zsa Zsa Marcel as the perpetrator of that robbery. There was no deficient performance because counsel would be prohibited from creating a trial-within-a-trial. McCoy is seeking to create a trial of the Lee's Chicken robbery with Marcel as the defendant inside his trial for the robbery at the ABC store. Nor was their any prejudice. McCoy's theory of bias was that Marcel had an interest in McCoy being convicted of this robbery and murder because then he would then be a convicted felon and would not be a credible witness against her in any future prosecution for the Lee's Chicken robbery. The flaw in this theory of bias, of course, is that McCoy was already a four-time convicted felon. Moreover, McCoy was allowed to present this theory

of bias to the jury in his testimony and in closing argument. The trial court properly denied the claim of ineffectiveness.

ISSUE VI

McCoy asserts a claim of cumulative error. Because there was no ineffectiveness regarding any of the individual claims, there necessarily was no cumulative error. The trial court properly denied the claim of cumulative error.

ISSUE VII

McCoy asserts that his death sentence violates *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). First, this claim is procedurally barred because a *Ring* claim was raised in the direct appeal of this case. Furthermore, *Ring* does not apply to this particular case because the prior violent felony and the under-sentence-of-imprisonment aggravators are present. Recidivist aggravators are exempt from the holding in *Ring*. Furthermore, one of the aggravating circumstances found by the trial court was the during-the-course-of-a-felony aggravator. This Court has repeatedly held that *Ring* does not apply to cases where the jury convicts a defendant in the guilty phase of a separate felony. The jury unanimously convicted McCoy of the separate felony of armed robbery during the guilt phase. *Ring* was satisfied in the guilt phase in this particular case. Moreover, the jury necessarily found an aggravating circumstance when recommending a death sentence. In Florida, a jury must find an aggravating circumstance before recommending a death sentence. Florida's death penalty statute does

not violate the Sixth Amendment right to a jury trial, as this Court has repeatedly held.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT PROPERLY DENIED THE CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO PRESENT THE "ALIBI" TESTIMONY OF THE DEFENDANT'S MOTHER THAT MCCOY WAS AT A BIRTHDAY PARTY AT THE TIME HE CONFESSED TO ZSA ZSA MARCEL? (Restated)

McCoy asserts that his trial counsels, Chief Assistant Public Defender Alan Chipperfield and Assistant Public Defender Ronald P. Higbee, were ineffective for not presenting his mother, Josie McCoy, to testify that McCoy was at the family birthday party at the time Marcel claimed that McCoy confessed her. There was no deficient performance. McCoy's confession to Marcel was recorded as part of an undercover operation. McCoy admitted both at trial during his testimony and at the evidentiary hearing that the voice on the recording was his. Nor is there any prejudice. The State presented the undercover recording of McCoy's confession to Marcel. The trial court properly denied this claim following an evidentiary hearing on the matter.

Evidentiary hearing testimony

At the evidentiary hearing, Postconviction counsel presented another witness to support this claim because Ms. McCoy was not available to testify at the evidentiary hearing due to recent hospitalization. Instead, postconviction counsel presented Diana Peterson, a close friend of the family who attended the birthday party.

Diana Peterson testified that she is a good friend of the defendant's mother, Josey McCoy, whom she has known for about 21 years. She testified that she saw Richard McCoy on June 14, 2000 between 5:00 and 7:00 at his mother's house. They were having a birthday party for McCoy's sister, Barbara McCoy. (Evid H at 13, 16,20). Ms. Peterson testified that she informed McCoy's attorney, Mr. Chipperfield, that McCoy was at his mother's house that the day and time before the trial.

On cross, Ms. Peterson could not recall the year. She testified that it could have been 2005 or 2006 and that she was "not for sure exactly." She testified at the evidentiary hearing that she had testified at the trial. Diana Peterson also testified that she watched the trial. She testified at the evidentiary hearing that she testified to the same facts at the trial as she testified at the evidentiary hearing. On redirect, she testified that she could be mistaken about testifying at trial rather than at a pre-trial hearing. (Evid H at 19).

Trial counsel, APD Alan Chipperfield, testified that while he spoke with the defendant's mother, Ms. Josey McCoy he did not call her as a witness. Trial counsel testified that he did not remember why he did not impeach Marcel with her deposition that she meet with McCoy in the afternoon. At trial, Marcel testified that the meeting occurred in the afternoon. (Evid H at 48 citing T. X 747). In her deposition, Marcel testified that the meeting occurred in the evening. (Evid H at 49 citing page 57 of Marcel December 12 deposition). In her sworn statement of June 23, 2000, Marcel refers

to both afternoon and evening. (Evid H at 50). Trial counsel stated that he probably should have cross examined Marcel regarding the difference in time. However, on cross, trial counsel testified that he was aware that both Marcel and McCoy were under surveillance by Jacksonville Sheriff's Office at the time of the recording.

McCoy testified at the evidentiary hearing admitting again, as he did at trial, that the voice on the tape recording was his.

The trial court's ruling

The trial court rejected claim I, subclaim (b), finding that defense counsel "made a reasonable tactical decision not to call Ms. McCoy as a witness." The trial court noted defense counsel testimony at the evidentiary hearing that "he was aware that the Defendant and Ms. Marcel were under surveillance by Jacksonville Sheriff's Office personnel at the time Defendant confessed to Ms. Marcel."

Standard of review

This Court reviews claim of ineffective assistance of counsel *de novo*. *Douglas v. State*, - So.3d -, -, 2012 WL 16745, 5 (Fla. January 5, 2012)(stating that, "in reviewing a trial court's ruling after an evidentiary hearing on an ineffective assistance of counsel claim, this Court employs a mixed standard of review, deferring to the postconviction court's factual findings that are supported by competent, substantial evidence, but reviewing the postconviction court's application of the law to the facts de novo" citing *Mungin*

v. State, 932 So.2d 986, 998 (Fla. 2006)). The standard of review is *de novo*.

Merits

The Florida Supreme Court recently explained the legal test for ineffective assistance of counsel claims in *Bradley v. State*, 33 So.3d 664, 671-672 (Fla. 2010)(citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). A claim for ineffective assistance of trial counsel must satisfy two criteria. First, counsel's performance must be shown to be deficient. Deficient performance in this context means that counsel's performance fell below the standard guaranteed by the Sixth Amendment. When examining counsel's performance, an objective standard of reasonableness applies, and great deference is given to counsel's performance. The defendant bears the burden to "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" This Court has made clear that strategic decisions do not constitute ineffective assistance of counsel. There is a strong presumption that trial counsel's performance was not ineffective.

Second, the deficient performance must have prejudiced the defendant, ultimately depriving the defendant of a fair trial with a reliable result. A defendant must do more than speculate that an error affected the outcome. Prejudice is met only if there is a reasonable probability that "but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine

confidence in the outcome." Both deficient performance and prejudice must be shown.

The presumption that defense counsel's decisions were reasonable is even stronger when dealing with highly experienced capital defense counsel. *Reed v. Sec'y, Fla. Dept. of Corr.,* 593 F.3d 1217, 1244 (11th Cir. 2010)(noting defense counsel's "extensive experience as a trial lawyer" where counsel had thirteen years' experience and had tried more than thirty homicide cases, most of which were capital cases and explaining that the presumption that counsel's performance is reasonable is "even stronger" when counsel is particularly experienced citing *Chandler v. United States*, 218 F.3d 1305, 1316 & n. 18 (11th Cir. 2000)(en banc)).

Lead defense counsel, Chief Assistant Public Defender Alan Chipperfield, has vast experience in capital cases. Mr. Chipperfield joined the Office of the Public Defender in 1979. (Evid H at 122). He has handled, as either lead counsel or second chair, "around 120" first degree murder cases. (Evid H at 123). He has tried "either 19 or 20" penalty phases. (Evid H at 123).

Furthermore, Chief Assistant Public Defender Chipperfield had co-counsel, Assistant Public Defender Ronald P. Higbee (Evid H at 123). McCoy did not call co-counsel Higbee to testify at the evidentiary hearing. Furthermore, they had a investigator, Xenia Regalado, who worked with them on this case. (Evid H at 45). Here, not one, but two highly experienced public defenders made these strategic decisions.

Unfortunately, as the trial court noted, defense counsel did not have his trial notes to refresh his memory of the case. This is a common and reoccurring problem in capital postconviction litigation. *Douglas v. State*, - So.3d -, -, 2012 WL 16745, 7 (Fla. 2012)(noting that trial counsel Refik Eler and Ruth Ann Hepler had stated that their files on this case were missing pertinent records and they had no independent recollection of their preparation for the penalty phase). This Court should require trial counsel to keep the originals of his trial files and only provide copies of his trial files to appellate counsel and postconviction counsel in every capital case.

There was no deficient performance. Counsel made the reasonable strategic decision not to explore on cross-examination the discrepancy between Marcel's deposition testimony and her trial testimony about the recording occurring in the afternoon versus evening because it would not have been fruitful. There is no point in raising a claim that McCoy was at a birthday at the time of the undercover recording when the State can readily and throughly demolish any such defense with highly credible officers.

This was an undercover controlled recording. Several deputies were involved. The prosecutor merely would have called the numerous officers involved in the undercover recording to establish the exact time of the recording to the minute using their reports and to McCoy's presence at the time of the recording. Trial counsel knew that these officers were involved and readily available to the prosecutor and that through them the prosecutor could easily establish the precise time of the recording and that McCoy was present. Any attempt to

establish an alibi at the time of the recording would have undermined trial counsel's credibility. Trial counsel made a reasonable strategic decision that he could not make anything of it.

Furthermore, Diana Peterson was not a good witness. She was mistaken about the year the birthday party occurred. Moreover, she was mistaken about testifying during McCoy's trial. Diana Peterson did not testify at trial at either the guilt or penalty phase. McCoy's youngest sister, Barbara McCoy, whose birthday party it was, testified at the penalty phase.

Nor was there any prejudice. McCoy testified during the guilt phase and admitted that it was his voice on the recording in front of the jury. He admitted that the voice on the tape was his. (T. XII 1014). He averred that he lied on the tape about being "in the place." (T. XII 1015). He testified that he told Marcel that he robbed the ABC Liquors store to impress her. McCoy testified at the evidentiary hearing admitting again that the voice on the tape recording was his. (Evid H at 175).

The purpose of the tape was to establish the identity of the perpetrator, *i.e.*, that McCoy was the killer. Even without the tape, the State had scientific evidence of identity. McCoy's fingerprints were located on the ABC receipt bag from a counter store where customers have no access to the liquor, much less receipt bags. His explanation of his fingerprints being on the bag was wholly incredible and proven so by the prosecutor in his rebuttal presentation. Even if trial counsel could have somehow impeached Marcel about the time

of the recording, the jury still would have found McCoy to be the person on the tape recording and to be the killer.

There was no deficient performance or prejudice. The trial court properly denied this claim following an evidentiary hearing on the matter.

ISSUE II

WHETHER THE TRIAL COURT PROPERLY DENIED THE CLAIM OF INEFFECTIVENESS FOR FAILING TO OBJECT TO REFERENCES TO THE ISLAMIC RELIGION FOLLOWING AN EVIDENTIARY HEARING? (Restated)

McCoy asserts that his trial attorneys, Chief Assistant Public Defender Alan Chipperfield and Assistant Public Defender Ronald P. Higbee, were ineffective for failing to object to religious references. McCoy asserts the trial counsel should have objected to the prosecutor's reference to God and to Ms. Wiley victim's impact testimony containing religious statements. There was no deficient performance. The prosecutor never referred to the defendant's faith. The prosecutor merely told the jury to use their God-given common sense which is not objectionable. The victim impact testimony was proper and therefore, not objectionable. Furthermore, there was no prejudice. This trial and penalty phase occurred prior to the September 11th attacks. The trial court properly denied the claim of ineffectiveness.

Trial and penalty phase

During jury selection, the prosecutor ask the jury if "will all of you promise to apply your God-given common sense" in deliberations. (Vol. VIII 228).

During the penalty phase, the prosecutor presented three victim impact witnesses, including the victim's sister, Ms Linda Wiley. (TR Vol. XVI 1308-1315). Linda Wiley testified that her sister was a good

mother and hard working. (TR Vol. XVI 1308). She also testified that her sister was a born-again Christian. (TR Vol. XVI 1309).

Evidentiary hearing testimony

The trial prosecutor, John Guy, testified at the evidentiary hearing. He had not been listed as a witness by post-conviction counsel but the State did not object. Mr. Guy testified that he and Assistant State Attorney Melissa Williamson tried this case. (EVID H at 21). Mr. Guy had not reviewed the numerous pre-trial motions filed in this case, so, he could not recall whether a pre-trial motion in limine seeking to exclude references to religion had been filed. The prosecutor testified that he could not recall doing so in this but that he often asks during jury selection if the juror will use their "God-given" common sense.

Postconviction counsel showed the prosecutor the trial transcript of jury selection which reflected that the prosecutor invoked the word "God." (EVID H at 22 citing Vol. VIII 228). The prosecutor quoted himself as saying "will all of you promise to apply your God-given common sense" in deliberations. Postconviction counsel referred to Linda Wiley, who was a victim impact witness at the penalty phase, who testified that her sister was a born-again Christian. (T. at 1309).

Defense counsel, Alan Chipperfield, testified that another prosecutor Bernie De La Rionda uses the phrase "God" given common sense "all the time." (Evid H at 58). Defense counsel testified that the public defenders were discussing this in the office a couple of

months ago but before that, he never thought about objecting to it. (Evid H at 59). His opinion is that he should object but he did not articulate any basis for doing so. (Evid H at 59).

The trial court's ruling

The trial court denied claim VI, following an evidentiary hearing on the matter, finding that the prosecutor's comment about god-given common sense was not objectionable. The trial court also found that the victim impact testimony regarding the victim being a born-again Christian was proper victim impact testimony.

Standard of review

This Court reviews claim of ineffective assistance of counsel *de novo*. *Douglas v. State*, - So.3d -, -, 2012 WL 16745, 5 (Fla. January 5, 2012)(stating that, "in reviewing a trial court's ruling after an evidentiary hearing on an ineffective assistance of counsel claim, this Court employs a mixed standard of review, deferring to the postconviction court's factual findings that are supported by competent, substantial evidence, but reviewing the postconviction court's application of the law to the facts de novo" citing *Mungin v. State*, 932 So.2d 986, 998 (Fla. 2006)). The standard of review is *de novo*.

Merits

There was no deficient performance. The prosecutor's question regarding jurors using their "God-given" common sense is not

objectionable. There is no case from the Florida Supreme Court prohibiting such a question. Counsel is not ineffective for not making baseless objections with no caselaw support. No one would take the phrase "God given" common sense as an endorsement of a particular faith or as anti-Islamic. *Cf. United States v. Malik*, 2007 WL 2153560, *3 (3rd Cir. 2007)(unpublished)(concluding that prosecutor's reference to the "Muslim guy" in the wake of September 11th did not require a mistrial). The average person and therefore, the average juror, had very little knowledge of, or opinions regarding, the Islamic faith prior to that date.

Nor was counsel's performance deficient when he did not object to the victim impact reference to the victim being a born-again Christian. It is proper for a witness to testify as to the victim's religious beliefs during victim impact testimony. *Pickren v. State*, 500 S.E.2d 566, 568 (Ga. 1998)(noting that victim impact evidence provides a glimpse into the life of the victim, by describing the victim's "personal life, family life, employment, recreation, church" and explaining that religious references are not forbidden). One of the purposes of victim impact evidence is to explain the loss of the victim to family and friends including church members. *Pickren*, 500 S.E.2d at 568. Counsel had no basis to object.

Nor was there any prejudice. The trial and penalty phase were conducted prior to the September 11th terrorist attacks. This trial was conducted in May of 2001 and penalty phase was held on June 28, 2001, which was prior to the September 11, 2001 attacks. Furthermore, the trial court found the defendant's Muslim faith to

be a non-statutory mitigator. The trial court properly denied the claim of ineffectiveness.

ISSUE III

WHETHER THE TRIAL COURT PROPERLY DENIED THE CLAIM OF INEFFECTIVENESS FOR CONCEDING TO ROBBERY? (Restated)

McCoy asserts that his trial counsels, Chief Assistant Public Defender Alan Chipperfield and Assistant Public Defender Ronald P. Higbee, were ineffective for conceding that a robbery had occurred. Counsel did not concede that McCoy was the perpetrator, only that a crime had occurred. As the trial court found, based on defense counsel testimony that arguing that it wasn't a robbery would be a "weak" argument, there was no deficient performance. Nor was there any prejudice because the jury would have convicted McCoy of robbery with a firearm in a case where there was a videotape and testimony that money was missing regardless of counsel's "concession" that a robbery occurred. The trial court properly denied this claim of ineffectiveness following an evidentiary hearing.

Trial

Defense counsel stated during voir dire that there was "no question" that there was a robbery and murder. Defense counsel told the jury: "the issue in this trial will be is he the one who did it." (T. 242).

Evidentiary hearing testimony

At the evidentiary hearing, defense counsel, Alan Chipperfield, testified that he conceded that a robbery occurred, not that McCoy committed it. (Evid H at 61). His defense to the felony murder theory

was that McCoy was not the perpetrator. (Evid H at 61). He explained that "you lose points with the jury on the main issue if you contest those issues which you don't have a good argument on." (Evid H at 61). Arguing that "it wasn't a robbery is a weak argument." (Evid H at 62). "You want to keep your main argument as strong as you can." (Evid H at 62). While there was nothing taken on the videotape, there was testimony that money was missing which is a basis for robbery. (Evid H at 60).

On cross, Mr. Chipperfield testified that his defense was that McCoy did not commit the crime. (Evid H at 123). Trial counsel also testified that he would have lost credibility with the jury if he had suggested that a robbery had not occurred. (Evid H at 127-128).

McCoy testified at the evidentiary hearing that Mr. Chipperfield did not consult with him regarding the admission that a robbery occurred but that McCoy did not commit it. (Evid H at 154). McCoy seems to think that there was no evidence of robbery because, while the videotape shows the gunman leading the victim around to the cash registers, it does not show money being taken. (Evid H at 178).

The trial court's ruling

The trial court rejected claim seven of ineffectiveness for conceding that a robbery occurred finding that defense counsel "made a reasonable tactical decision to concede that a robbery and murder occurred" citing *Belcher v. State*, 961 So.2d 239, 249 (Fla. 2007). The trial court relied on defense counsel's testimony at the evidentiary hearing that he believed "that it was weak to argue that

there was no robbery." Instead, "it was a much stronger argument that the Defendant was not the perpetrator" citing PC Vol I at 60-61).

Standard of review

This Court reviews claim of ineffective assistance of counsel *de novo*. *Douglas v. State*, - So.3d -, -, 2012 WL 16745, 5 (Fla. January 5, 2012)(stating that, "in reviewing a trial court's ruling after an evidentiary hearing on an ineffective assistance of counsel claim, this Court employs a mixed standard of review, deferring to the postconviction court's factual findings that are supported by competent, substantial evidence, but reviewing the postconviction court's application of the law to the facts de novo" citing *Mungin v. State*, 932 So.2d 986, 998 (Fla. 2006)). The standard of review is *de novo*.

Merits

In *Florida v. Nixon*, 543 U.S. 175, 125 S.Ct. 551, 160 L.Ed.2d 565 (2004), the United States Supreme Court held that a concession of guilt is governed by *Strickland*, not *Cronic*, and that while an attorney has a duty to consult, he is not required to obtain the defendant's express consent to a concession of guilt. Contrary to postconviction counsel's reading of *Nixon*, the United States Supreme Court did not hold, or even hint, that counsel can concede guilt "only in exceptional circumstances where the evidence of guilt is undisputed." IB at 46. First, this argument is circular. The evidence is "undisputed" because counsel is conceding. If

post-conviction counsel actually meant to say that *Nixon* is limited to cases where the evidence of guilt is overwhelming, that is an accurate description of the strength of the State's case in both *Nixon* and this case. *Nixon*, 543 U.S. at 180-181 & n.2, 125 S.Ct. at 556-557 & n.2. (stating that the "State gathered overwhelming evidence establishing that Nixon had committed the murder" and agreeing with the defense counsel's conclusion that "given the strength of the evidence, that Nixon's guilt was not subject to any reasonable dispute" and observing in a footnote every court that had reviewed the case agreed with assessment of the strength of the evidence). The *Nixon* Court did not limit its holding to "exceptional" circumstances or cases.

This claim is meritless as a matter of law. A "concession" that the crime occurred or that the victim is dead is not a true *Nixon* claim. Counsel must acknowledge that the defendant is the perpetrator or it is not a concession as the law defines that term. Where counsel acknowledges that the crime occurred but argues that the defendant is not the perpetrator that is not a concession as envisioned by *Nixon*. A true *Nixon* claim requires that counsel concede that the defendant is the perpetrator.

Here, counsel argued that "the issue in this trial will be is he the one who did it" and presented an alibi defense. (TR Vol. 242). His defense was that McCoy was not at the ABC store at the time of the robbery/murder.

There was no deficient performance. As trial counsel testified, he would have lost credibility with the jury if he had suggested that

a robbery had not occurred. (Evid H at 127-128). Appellate counsel agreed with defense counsel's estimation because appellate counsel did not challenge the robbery with a firearm conviction on appeal either. *McCoy*, 853 So.2d at 400 n.3 (noting McCoy did not challenge his armed robbery conviction on appeal). Mr. Chipperfield was not required to consult with McCoy regarding such an innocuous concession, much less obtain his consent.

In *Belcher v. State*, 961 So.2d 239, 249 (Fla. 2007), the Florida Supreme Court rejected a similar claim of ineffectiveness for conceding to the crime. Defense counsel in opening statement had said:

> Obviously, and quite tragically, Ms. Embry is dead. There's no dispute about that, and there's really no dispute about the things that the State went over in great detail with you about, such as she lived at home alone, that her brother found her when she didn't show up for school and work that day. Those kind of things. And so a lot of the evidence that you'll be hearing will be important for your consideration. But the evidence, that kind of evidence, will not show you what the ultimate question is. It won't answer the ultimate question for you, which is who did it. And that's what you need to be concerned with.

Belcher, 961 So.2d at 249.

The Florida Supreme Court in *Belcher* agreed with the trial court's finding that there was no deficient performance because this statement "did not specifically concede anything relevant to their defense." The Florida Supreme Court found that defense counsel only admitted the fact that victim Embry was deceased, not that a sexual battery occurred or his client's guilt in such a crime. So, any claim of ineffectiveness for "conceding" was refuted by the record. The Florida Supreme Court also noted defense counsel's testimony at the evidentiary hearing that this statement was part of a strategy to

build credibility with the jury by not disputing the fact that the victim was dead. The Florida Supreme Court also found that "[t]his strategic decision to concede the victim's death in the opening statement provides no basis for an ineffectiveness claim."

Here, as in *Belcher*, there is no basis for an ineffectiveness claim. Here, as in *Belcher*, the record refutes that there was any concession of guilt on the part of McCoy to either robbery or murder. Here, as in *Belcher*, conceding that a robbery occurred was part of a strategy to build credibility with the jury by not disputing the indisputable aspects of the case.

Nor was there any prejudice from counsel's acknowledging that a robbery occurred. At trial, the regional manager, Theresa Johnson, testified that $415.00 was missing from the store. (IX 623). Any jury presented with a videotape of a perpetrator leading the manager of the store from cash register to cash register where the manager was later murderer as well as testimony that money was missing from the store, would naturally find that a robbery occurred, just as McCoy's jury did in the case. Accordingly, the trial court properly denied this claim of ineffectiveness following an evidentiary hearing.

ISSUE IV

WHETHER THE TRIAL COURT PROPERLY DENIED THE CLAIM OF INEFFECTIVENESS FOR NOT ADVISING MCCOY OF THE DANGERS OF TESTIFYING IN HIS OWN BEHALF? (Restated)

McCoy asserts that his trial counsels, Chief Assistant Public Defender Alan Chipperfield and Assistant Public Defender Ronald P. Higbee, were ineffective for not advising him not to testify. McCoy claims that defense counsel did not prepare him to testify or warn him about cross-examination. The trial court found defense counsel's testimony at the evidentiary hearing that he discussed the decision to testify multiple times with the defendant more credible than the defendant's testimony at the evidentiary hearing that counsel did not. Moreover, as the trial court also noted, the trial court itself warned McCoy about the dangers of testifying during the colloquy conducted prior to McCoy's testimony in the guilt phase. The trial court's colloquy specifically referenced cross-examination including McCoy's being cross-examined regarding his prior convictions. The trial court properly denied this claim of ineffectiveness following an evidentiary hearing on the matter.

Trial

McCoy testified during the guilt phase of the trial in his own behalf. (XI 998). Prior to his testimony, the trial court conducted a colloquy regarding the decision to testify, informing McCoy that he had a right not to testify and that the decision was "his and his alone" to make. (T. Vol. XI 997-998). The trial court informed McCoy that he had "an absolute right to testify" and an

"equally absolute right not to testify". (T. Vol. XI 997). The trial court asked if anyone was compelling or forcing the defendant to testify and McCoy responded: "no, sir". (T. Vol. XI 997). The trial court asked if McCoy had been advised of the consequences of testifying such as being cross-examined about his prior felony convictions and responded: "Yes, sir, I have." (T. Vol. XI 997). McCoy stated on the record that he had been advised of the consequences of testifying and that he thought it was in his best interest to testify. (T. Vol. XI 997).

McCoy then testified that he did not rob the ABC store on Edgewood Avenue or kill Shervie Elliot. (XI 1000). He testified as to his whereabouts on the morning of June 13. (XII 1005). He testified that he left his girlfriend's house, Dorothy Small, at 6:45 and went to his father's house to take a bath. (1005). He forget to take out the trash at Dorothy's house, so he returned at 8:00. (1005). When he was taking out the trash, he spoke with the neighbor, Sherry Cross, for about five or six minutes. (1007). He then put water in his car's radiator. (XII 1008). At 8:12, he was hungry, so he went to the Krystal on Edgewood Avenue. (1008). You turn left to go to Krystal but right to go to the ABC Liquors store. (1009). According to his testimony, he ordered his regular breakfast at Krystal. (1010). He called Dorothy Small at 9:00.

He admitted he had a relationship with Zsa Zsa Marcel. According to his testimony, on June 10, Marcel robbed the Lee's Chicken. (1014). He admitted that the voice on the tape was his. (1014). He averred that he lied on the tape about being "in the place." (1015). He

testified that he told Marcel that he robbed the ABC Liquors store to impress her. McCoy testified that he had four prior convictions. (1026).

McCoy testified that he ran across an ABC Liquor receipt bag on April 8, 2000. (1026, 1038). He testified that he spent Friday night, April 7, 2000, at the Day's Inn motel near Roosevelt with Gwendolyn Brown. (XII 1039). He pulled into the parking lot of the ABC Liquors store on Roosevelt to change a flat tire and he saw an unzipped bag with nothing in it. (1027). He testified that he picked it up and mailed the bag back to ABC. (1027,1037). He could not return the receipt bag to the store because they were closed. (1038) He changed the tire, went to post office and mailed the receipt to Orlando.

As this Court noted in the direct appeal:

> McCoy testified in his own defense. He testified that on the morning of June 13, 2000, he left Small's house at 6:45 a.m. and went home. He returned to Small's house at around 8 a.m. to take trash to the curb, and spoke with Cross at that time. After completion of this chore, McCoy went to Krystal Burger, ate breakfast, and then proceeded to an interview. He and Marcel had a relationship, and he knew that she was "tough"-she had confessed to him that she robbed a restaurant on June 10. McCoy testified that, therefore, he lied to her and claimed that he had robbed ABC Liquors, in an effort to impress her. He explained that his fingerprints were on the ABC Liquors receipt pouch because he had once found one of the pouches in another ABC store parking lot, and mailed it to ABC Liquors headquarters in Orlando.

McCoy, 853 So.2d at 400.

Evidentiary hearing testimony

At the evidentiary hearing, defense counsel, Assistant Public Defender Mr. Chipperfield, testified this was a "very difficult

case." (Evid H at 72, 131). If you are raising an alibi defense, it helps to have the defendant testify. (Evid H at 72).

Trial counsel stated that the decision to testify was not a decision that he makes. (Evid H at 72). He leaves the decision to the client. (Evid H at 72). He did not push Richard by saying yes you should testify or you should not testify. (Evid H at 74). Trial counsel did not specifically recall the conversation he had with McCoy regarding his client testifying at trial, but it has "always" been his practice to discuss the matter. (Evid H at 131). It was his practice to discuss the defendant's right to testify with him on multiple occasions in a capital case. (Evid H at 131). At one point, McCoy had decided not to testify. (Evid H at 74).

He did not recall advising McCoy to testify but he did tell him that if they could not explain the fingerprints on the ABC receipt bag it was going to be "a problem." (Evid H at 74). Trial counsel noted that some of the details regarding McCoy's story about how his fingerprint came to be on the bag "were new" to him. (Evid H at 75). Mr. Chipperfield remembered explaining to McCoy that explaining his fingerprints on the receipt bag "was going to be very hard." (Evid H at 131). He explained that his strategy in dealing with the State's fingerprint expert, because the latent prints on the bag were only partial prints, was to have the expert admit that, while no two people have the same fingerprints, there was no study regarding whether two people could have the same one-eighth of a fingerprint. (Evid H at 132-133). McCoy undermined this strategy with his trial testimony admitting that the fingerprint on the bag were his. (Evid H at 132).

McCoy also testified at the evidentiary hearing. (Evid H at 140). He testified that he had no plans to testify until the trial court ruled that the defense had to lay the foundation to admit the Lee's Chicken robbery victim's testimony. (Evid H at 162). It was this ruling that made McCoy change his mind and decide to testify. (Evid H at 162-163). McCoy testified that Mr. Chipperfield did not prepare him for his testimony and that Mr. Chipperfield did not warn him about cross-examination by the prosecutor. (Evid H at 163). McCoy testified that but for laying the foundation and then recalling Marcel, he would not have testified at trial. (Evid H at 163-164).

McCoy testified that they had not discussed his testifying prior to trial. (Evid H at 164). McCoy admitted the trial court informed that he had a right not to testify but to lay the foundation, he had to testify. (Evid H at 165). McCoy testified that even after the trial court's ruling on laying the foundation, he and defense counsel did not discuss the areas of his testimony. (Evid H at 165). McCoy testified that while he had told Mr. Chipperfield how his fingerprints got on the ABC receipt bag, they had not discussed his testifying as to that story prior to his trial testimony. (Evid H at 166).

The trial court's ruling

The trial court rejected this claim of ineffectiveness for not advising McCoy regarding the dangers cross-examination based on the colloquy conducted by the trial court prior to McCoy testifying at trial. The trial court also found defense more credible than McCoy's testimony that counsel did not.

Standard of review

Normally, this Court reviews claims of ineffective assistance of counsel *de novo*. *Douglas v. State*, - So.3d -, -, 2012 WL 16745, 5 (Fla. January 5, 2012)(stating that, "in reviewing a trial court's ruling after an evidentiary hearing on an ineffective assistance of counsel claim, this Court employs a mixed standard of review, deferring to the postconviction court's factual findings that are supported by competent, substantial evidence, but reviewing the postconviction court's application of the law to the facts de novo" citing *Mungin v. State*, 932 So.2d 986, 998 (Fla. 2006)). Here, however, because the trial court made a credibility finding, this Court must defer to that finding unless it is clearly erroneous. As this Court recently explained in a case where one of the claims was a claim of ineffective assistance of counsel and the trial court made "extensive findings of fact and credibility" regarding the claim, this Court is "highly deferential to the trial court's judgment on the issue of credibility" and "will not substitute its judgment for that of the trial court on the credibility of the witnesses provided its order is supported by competent, substantial evidence." *Crain v. State*, - So.3d -, -, 2011 WL 4835656, *15-*16 (Fla. October 13, 2011).

Merits

There was no deficient performance. Whether to have a defendant testify, who has prior convictions, to establish an alibi defense is a very difficult decision. Sherry Cross, a neighbor of one of McCoy's

girlfriends, testified that she spoke with McCoy between 8:00 and 8:30 which was approximately when the murder occurred. She seemed to be an unbiased, neutral observer. The State's impeachment of her consisted mainly of the time of the conversation being a little earlier, not her credibility or bias. McCoy testified that when he was taking out the trash, he spoke with the neighbor, Sherry Cross, for about five or six minutes. (XII 1007). McCoy's testimony corroborated the neighbor's testimony that he was talking to her at the time of the murder. While McCoy could be impeached with his prior convictions, he could also verify this powerful alibi. This was a high risk either way.

Furthermore, the defendant's testimony "severely damaged" the defense because McCoy insisted on committing perjury by concocting a story to explain his fingerprints on the ABC receipt bag. McCoy's concocted story was demolished by the State in its rebuttal. This concocted story was unknown to defense counsel who testified that this concocted story was a surprise to him. (Evid H at 75). Basically, McCoy surprised defense counsel with this concocted story about his fingerprints getting on the ABC bag when he found the bag in a parking lot and then mailed it back to ABC and thought he was going to surprise the prosecution too.

McCoy is complaining that his attorney did not stop him from committing perjury when he did not even tell his attorney that he was planning on lying under oath about the fingerprints. Ineffective assistance of counsel claims may not be premised on the defendant's conduct of committing perjury. *Nix v. Whiteside*, 475 U.S. 157, 166,

106 S.Ct. 988, 994, 89 L.Ed.2d 123 (1986)(rejecting a claim on ineffective assistance of counsel premised on the defendant's wish to commit perjury "as a matter of law" in a case where the lawyer informed his client that if the defendant changed his version of events and testified untruthfully he would inform the court of the perjury and move to withdraw). McCoy, unlike Whiteside, ended up being allowed to commit perjury without any interference from his counsel but is still asserting ineffective assistance of counsel nonetheless. In a twist on *Whiteside*, the defendant here is claiming that his attorney was ineffective for not foreseeing his client was going to commit perjury and telling him not to do so because the State will be able to establish that it is perjury in its rebuttal case. While this is the converse of *Whiteside* factually, the same rule of law applies for the same reasons as those given in *Whiteside* and precludes a defendant from asserting ineffectiveness based on perjury.

Furthermore, McCoy undermined his attorney's chosen strategy with his testimony. As defense counsel testified at the evidentiary hearing, his strategy in dealing with the State's fingerprint expert was going to be that, because the latent prints on the bag were only partial prints, he was going to have the expert admit that, while no two people have the same fingerprints, there was no study regarding whether two people could have the same one-eighth of a fingerprint. (Evid H at 132-133). McCoy undermined this strategy with his trial testimony admitting that the fingerprints on the bag were his. (Evid H at 132). McCoy undermined his own attorney's strategy in dealing

with the fingerprints. McCoy's falsified testimony was not the attorney's strategy to deal with the fingerprints; it was McCoy's. And just as a defendant who represents himself may not raise a claim of ineffective assistance of counsel, a defendant who employs his own strategy, contrary to that of his attorney, may not blame his attorney for its failure. *Faretta v. California*, 422 U.S. 806, 834, n.46, 95 S.Ct. 2525, 2540, n.46, 45 L.Ed.2d 562 (1975)(explaining that "a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of effective assistance of counsel.").

Nor was there any significant prejudice from the defendant testifying. While the defendant's testimony, no doubt, helped the State rather than the defense, regardless of McCoy's testimony, the State presented an audiotaped confession and three of McCoy's fingerprints on the bag. Even if McCoy had not testified and defense counsel could have cross-examined the latent print expert about partial prints, three of McCoy's partial fingerprints were still on the bag. While defense counsel's strategy of dealing with the fingerprint evidence was undoubtably a better strategy than McCoy's strategy of committing perjury (and more honest), neither would have changed the basic facts of McCoy's fingerprints being on the bag. So, there was no prejudice. The trial court properly denied this claim of ineffectiveness following an evidentiary hearing.

ISSUE V

WHETHER THE TRIAL COURT PROPERLY DENIED THE CLAIM OF INEFFECTIVENESS FOR FAILING TO RECALL ZSA ZSA MARCEL TO IMPEACH HER? (Restated)

McCoy asserts that his trial counsels, Chief Assistant Public Defender Alan Chipperfield and Assistant Public Defender Ronald P. Higbee, were ineffective for failing to subpoena and present two of the victims of the Lee's Chicken robbery to identify state witness Zsa Zsa Marcel as the perpetrator of that robbery. There was no deficient performance because counsel would be prohibited from creating a trial-within-a-trial. McCoy is seeking to create a trial of the Lee's Chicken robbery with Marcel as the defendant inside his trial for the robbery at the ABC store. Nor was their any prejudice. McCoy's theory of bias was that Marcel had an interest in McCoy being convicted of this robbery and murder because then he would then be a convicted felon and would not be a credible witness against her in any future prosecution for the Lee's Chicken robbery. The flaw in this theory of bias, of course, is that McCoy was already a four-time convicted felon. Moreover, McCoy was allowed to present this theory of bias to the jury in his testimony and in closing argument. The trial court properly denied the claim of ineffectiveness.

Trial

Trial counsel filed a motion to compel investigation of the state's main witness in this case, Zsa Zsa Marcel's involvement in an unrelated robbery. (R. II 347-350). Marcel had confessed to McCoy that she had robbed Lee's Chicken. (II 347). Defense counsel asserted that

the prosecutor refused to investigate Marcel's involvement in the robbery until after McCoy's murder prosecution and was a deliberate attempt to prohibit defense counsel from impeaching her with pending charges. Defense counsel, relying upon *State v. Montgomery*, 467 So.2d 387 (Fla. 3d DCA 1985), requested that the trial court dismiss the charges against McCoy or prohibit Marcel from testifying at McCoy's trial. (II 349). The trial court discussed this motion at the hearing. (R. V 988).

The detective investigating the Lee's Chicken robbery conducted a photo lineup with Zsa Zsa Marcel's photograph in it. (T. 989). The victims of the Lee's Chicken robbery could not identify Marcel as the perpetrator. Defense counsel sent his investigator to interview an employee of Lee's Chicken. The employee informed him that the perpetrator was a woman with a bad scar on her neck. (T. 990). Two other victims of the Lee's Chicken robbery thought that the photograph that the investigator showed them may have been the perpetrator but they wanted to see Marcel in person and view her neck before they would be willing to positively identify her as the perpetrator. (T. 990-1).

Defense counsel requested that Marcel be presented to the victims. Defense counsel asserted that this established that Marcel had a motive to lie because if she could finger McCoy as the perpetrator of the ABC Liquors murder, he would become a non-credible witness against her in any prosecution of the Lee's Chicken robbery. (T. 992). Defense counsel also claimed that the prosecution was distorting the fact-finding process by refusing to investigate Marcel's involvement in the Lee's Chicken robbery. (T. 992-993). Defense counsel requested

that another State Attorney be assigned to prosecute due to the conflict of interest. (T. 994). The prosecutor denied any deliberate distortion, explaining that he took Marcel to the sheriff's office to have her photograph taken and to be interviewed. (T. 996). There simply was not enough evidence to charge her. (T. 997). The trial court pointed out that the PD's investigator poisoned the well by showing a single photograph of Marcel to the victims. (T. 998). The trial court denied the motion, finding no prosecutorial misconduct finding the prosecutor's actions were reasonable. (T. 1004).

At trial, defense counsel asked Marcel if she was afraid that McCoy would turn her in for a crime. (T. Vol. XI 816). The prosecutor objected. (T. Vol. XI 816). Defense counsel offered to proffer the evidence. (T. Vol. XI 817). The jury was excused and defense counsel proffered questions designed to show that Marcel was afraid McCoy would turn her in for the Lee's Chicken robbery. (T. Vol. XI 818). Marcel denied telling McCoy that she robbed Lee's Chicken. (T. Vol. XI 819). Defense counsel noted that Marcel wore a turtleneck to cover the scar on her neck.

Defense counsel had two of the victims of the robbery in the courthouse in an attempt to identify Marcel as the perpetrator of the robbery. (T. Vol. XI 819). The two victims wanted to be able to see Marcel's neck because the perpetrator was a African-American female with a scar on her neck. According to defense counsel, one of the employees who lives in the same apartment complex warned Marcel and she wore a wig and a turtleneck. Defense counsel requested that the trial court compel Marcel to show her neck to the two employees and

the jury. (T. Vol. XI 822). The prosecutor objected to the compelled line-up as a fishing expedition and that defense counsel was now trying to try a separate case. (T. Vol. XI 823).

The trial court characterized the request as bizarre and was struggling with the relevance of the request. (T. Vol. XI 824). The trial court was concerned that this secondary trial on an unrelated robbery would create a mistrial but was open to requiring the witness to return after the defendant took the stand and testified that Marcel confessed to perpetrating the Lee's Chicken robbery to him. The trial court decided to keep her under subpoena until the defense could establish that Marcel confessed to McCoy and the prosecutor could research the issue. (T. Vol. XI 828-829).

Marcel returned the next day, not wearing a turtleneck. (T. Vol. XI 841). The eyewitnesses to the Lee's Chicken robbery were in the courtroom hall.

The trial court noted, in a moment of levity, that the problem with really good lawyers was that they come up with really good problems. (T. Vol. XI 842). The trial court did not think he could require Marcel to show her neck to the eyewitnesses but allowed defense counsel to request her to do so (T. Vol. XI 843-844).

After the defense presented its case, defense counsel asked the trial court compel Marcel to show her neck to the eyewitnesses. (XI 989). One of prosecutors noted that the victims could not identify anyone. (991). The prosecutor also noted that the defense could establish this theory of bias by having the defendant testify that

Marcel confessed to committing the Lee's Chicken robbery rather than in this manner. (XI 993).

The trial court ruled that he did not have the authority to compel witnesses to do anything other than testify. (994). The trial court was willing to send a bailiff into the hall and explained to counsel that he could have the eyewitnesses look at Marcel who was also in the hall and granted defense counsel a recess to do so. (996). However, the eyewitnesses did not want to do so and left the courtroom. (996).

McCoy testified that Marcel confessed that she committed a crime to him. (XII 1012-1014). Defense counsel, in his closing argument, explained this theory of bias to the jury. (XII 1141-1142).

Direct appeal

The issue of limiting the cross-examination of Marcel was raised in the direct appeal. The Florida Supreme Court found:

> The appellant asserts that the trial court improperly limited his cross-examination of Marcel regarding her putative involvement in a restaurant robbery, as well as her behavior with regard to the telephone account of McCoy's father. First, our examination of the record reveals that the trial court never prohibited the defense from cross-examining Marcel on the subject of her putative Lee's Chicken robbery. In fact, the trial court only disallowed cross-examination on the subject during Marcel's testimony for the State, and then only because no evidentiary predicate on the matter had yet been established by the defense. At that time, the trial court explicitly advised the defense as follows:
>
> > I understand what you are doing. My concern is what if we go through all of this great exercise and we put her [Marcel] on trial for the armed robbery and we have all the people testify and all that kind of stuff and your client decides he doesn't want to testify what have we done at that point?
> >
> > ....

> We have created a mistrial because we have introduced gobs of totally irrelevant and very damaging evidence for the state that is totally irrelevant because there is at that point no evidence that she told him about it [the restaurant robbery].
>
> ....
>
> So I have this suspicion that if you are entitled to put this on at all you would only be entitled to put it on in your case and only then after you have had him [McCoy] testify that she [Marcel] confessed this to him which then makes it become relevant. I have no problem with making her come back for you to continue your cross examination of her after it is a matter of record that it is relevant, but I am not inclined to let all-let this secondary trial go on unless and until it becomes record evidence that he [McCoy] knew about it and that she [Marcel] knew anything about it.

The defense did not pursue the matter further during its case-in-chief, other than submitting the testimony of McCoy relating that Marcel had confessed to him her involvement in an armed robbery of Lee's Chicken. Clearly, the trial court did not limit cross-examination of Marcel as to this issue; therefore, no relief is warranted.

McCoy v. State, 853 So.2d 396, 406 (Fla. 2003)

The evidentiary hearing

Zsa Zsa Marcel testified at the evidentiary hearing. (Evid H at 106). She was a prosecution witness at McCoy's trial. (Evid H at 112). She was wearing a shirt at trial that covered her neck. (Evid H at 108). She admitted she had a scar on her neck. (Evid H at 109). The scar was from her neck being slit in 1992. (Evid H at 109). She was not ask, and did not testify, at the evidentiary hearing, as to her involvement in the Lee's Chicken robbery.

Trial counsel, Mr. Chipperfield, testified that he did not recall Marcel to the stand because she would just deny the robbery. (Evid

H at 67). This way he had unrebutted evidence. He was trying to create an issue but he kept losing. (Evid H at 67). His best effort to have the victim of the Lee's Chicken robbery identify Marcel as one of the robbers did not work because she was wearing a turtleneck. (Evid H at 68). Mr. Hires was in the hall of the courtroom telling the people not to "participate in my impromptu showup." (Evid H at 68). One of the victims was "very cooperative" until he ran into Mr. Hires in the hall. (Evid H at 68). He was not sure the victims were subpoenaed. (Evid H at 68). Marcel and her husband had been involved in a robbery and shooting at Lee's Chicken in April or May of 2000. (Evid H at 70). He followed up on the this information regarding the Lee's Chicken robbery that McCoy gave him but was not sure how long it took to track them down. (Evid H at 70).

His subfile regarding the Lee's Chicken robbery was missing from his trial files. (Evid H at 71). Mr. Chipperfield had released his trial files to the appellate counsel and his subfile relating to the Lee's Chicken robbery was missing, so he could not explain his trial strategy in relation to the Lee's Chicken robbery issue. (Evid H at 129-130).

Trial counsel testified that he "could not think of a way" that Marcel's involvement with the Lee's Chicken robbery would have effected the state's fingerprint evidence against McCoy. (Evid H at 129). Nor would it have effected the tape recorded conversation as Mr. Chipperfiled acknowledged. (Evid H at 129).

Neither of the two victims of that robbery who were at the trial were called to testify at the evidentiary hearing. Neither identified Ms. Marcel as the perpetrator of the Lee's Chicken robbery.

The trial court's ruling

Defendant raised this claim as claim X in his postconviction motion. The trial court denied the claim following an evidentiary hearing on the matter, finding no deficient performance because of counsel "diligent attempts" to have the jury exposed to Marcel's involvement in the Lee's Chicken robbery including a pre-trial motion to compel an investigation and arguing this theory of bias to the jury. The trial court "specifically" found "defense counsel made reasonable attempts to pursue this defense strategy" and found "no error on the part of defense counsel."

The trial court noted that recalling Marcel herself would have been futile because "she would have just denied it." As defense counsel testified, it was better to have Marcel's evasive behavior of wearing a turtleneck to hide her scar than her testimony denying any involvement. The trial court concluded that counsel made a reasonable tactical decision not to recall Marcel.

Standard of review

This Court reviews claims of ineffective assistance of counsel *de novo*. *Douglas v. State*, - So.3d -, -, 2012 WL 16745, 5 (Fla. January 5, 2012)(stating that, "in reviewing a trial court's ruling after an evidentiary hearing on an ineffective assistance of counsel claim,

this Court employs a mixed standard of review, deferring to the postconviction court's factual findings that are supported by competent, substantial evidence, but reviewing the postconviction court's application of the law to the facts de novo" citing *Mungin v. State*, 932 So.2d 986, 998 (Fla. 2006)). The standard of review is *de novo*.

Merits

Counsel could not explain his strategy relating to Marcel's participation in the other robbery because his trial files were not in order. Trial counsel's subfile regarding the Lee's Chicken robbery were missing from his trial files. (Evid H at 71). Mr. Chipperfield had released his trial files to the appellate counsel and his subfile relating to the Lee's Chicken robbery was missing, so he could not explain his trial strategy in relation to the Lee's Chicken robbery issue. (Evid H at 129-130).

This is a reoccurring problem. *Douglas v. State*, - So.3d -, -, 2012 WL 16745, 7 (Fla. 2012)(noting that trial counsel Refik Eler and Ruth Ann Hepler had stated that their files on this case were missing pertinent records and they had no independent recollection of their preparation for the penalty phase). Courts should not declare an attorney ineffective when that attorney may well have had a brilliant strategy for dealing with that aspect of the case but cannot recall that strategy because his files regarding the matter have been misplaced by either appellate counsel or post-conviction counsel. This Court needs to create a mechanism such that trial counsel's files

remain intact and in order during the appeal and post-conviction proceedings. This Court created the registry to archive important documents relating to capital cases but some of the most important documents of a capital case, those of trial counsel's personal trial files, are not covered by this Court's rules.

There was no deficient performance because it is highly doubtful that the testimony of these two witnesses was admissible. It would have created a "trial within a trial", *i.e.*, a trial of the Lee's Chicken robbery with Marcel as the defendant inside McCoy's ABC robbery/murder trial. *Slocum v. State*, 757 So.2d 1246 (Fla. 4th DCA 2000)(affirming the exclusion of testimony that would have "open[ed] the door to evidence about an unrelated case was to create a trial within a trial; there was a risk that the trial would be needlessly lengthened and that the additional evidence would obscure the discovery of the truth" and observing "[t]o have stepped into the quicksand of the other homicide case would have sunk this trial into litigation over the myriad details of a completely unrelated homicide."); *United States v. Thomas*, 467 F.3d 49, 56 (1st Cir. 2006)(refusing to allow the defendant, in a drug prosecution, to call other witness to prove an accusation that the confidential informant, who was a convicted felon, had retained for himself part of the drugs in another case in which he was as an informant citing Fed.R.Evid. 608(b) and noting the well-established rule that a party may not present extrinsic evidence to impeach a witness by contradiction on a collateral matter and rejecting a confrontation clause argument because allowing this type of impeachment would create "a trial within

a trial on a collateral matter."). The victims of the Lee's Chicken robbery identifying Marcel as one of the robbers is not admissible in an ABC murder trial. This would be the proverbial trial-within-a-trial scenario with impermissible line-up issues being involved. Indeed, the trial court's original hesitation at trial were based on these types of concerns and the trial court was right to have these concerns. Counsel made a reasonable decision not to pursue inadmissible testimony.

Nor was their any prejudice. McCoy's theory of bias was that Marcel had an interest in McCoy being convicted of this robbery and murder because then he would then be a convicted felon and would not be a credible witness against her in any future prosecution for the Lee's Chicken robbery. The flaw in this theory of bias, of course, is that McCoy was already a four-time convicted felon. McCoy had numerous prior convictions for robbery and attempted robbery. While he would now be a convicted murder as well as a convicted robber, the type of conviction is not admissible for impeachment purposes. *Garcia v. State*, 21 So.3d 30, 35 (Fla. 3rd DCA 2009)(stating that to impeach a testifying defendant by prior convictions, the State may inquire about the number - but not the nature - of the prior convictions citing Charles W. Ehrhardt, Florida Evidence § 610.6 (2009)); *Fotopoulos v. State*, 608 So.2d 784, 791 (Fla. 1992)(noting the "inquiry is generally restricted to the existence of prior convictions and the number of convictions."). So, this "bias" really only involves McCoy going from being a four-time convicted felon to being a six-time convicted felon.

But regardless of this flaw, McCoy was allowed to present this theory of bias to the jury in his testimony and in closing argument. McCoy testified during the guilt phase that on June 10, Marcel robbed the Lee's Chicken. (XII 1014). Additionally, defense counsel argued this theory of bias to the jury in closing.

McCoy has not established any prejudice. Postconviction counsel did not present either of the two victims of the Lee's Chicken robbery to identify Marcel as one of the perpetrators of the Lee's Chicken robbery at the evidentiary hearing. Without such an identification, there cannot possibly be a showing of any prejudice. McCoy was granted an evidentiary hearing to do what he claims trial counsel should have done at trial which is have the victims identify Marcel as one of the perpetrators of the Lee's Chicken robbery and he did not do so, which ends the matter. The lack of any identification is fatal to this claim of ineffectiveness.

Furthermore, even if the victim of the Lee's Chicken robbery had testified ***and*** identified Marcel as one of the perpetrators of that robbery, none of this undermines the State's case against McCoy. McCoy's fingerprints on the receipt bag and his admission to being inside the ABC liquor store on the recording remain regardless of Marcel's criminal activity. The jury would have convicted McCoy of the ABC robbery and murder regardless of any testimony that Marcel was involved in the Lee's Chicken robbery. The jury would simply have concluded that both Marcel and McCoy were robbers who hung out together and discussed their respective crimes with each other just as the State captured McCoy doing on the video recording of McCoy's

confession to Marcel. The trial court properly denied the claim of ineffectiveness.

ISSUE VI

WHETHER THE TRIAL COURT PROPERLY DENIED THE CLAIM OF CUMULATIVE ERROR? (Restated)

McCoy asserts that the trial court erred in denying his claim of cumulative ineffective assistance of counsel claim. There was no ineffective assistance of counsel and therefore, there was no cumulative ineffective assistance of counsel. The trial court properly denied the claim of cumulative error.

The trial court's ruling

McCoy raised this claim of cumulative error as claim XVIII in his post-conviction motion. The trial court rejected the cumulative error claim reasoning that because the trial court had rejected each individual claim, it consequently, rejected the cumulative error claim as well citing *Israel v. State*, 985 So.2d 510, 520 (Fla. 2008).

Merits

As this Court has held in numerous cases, when each of the claims of error fails individually, there necessarily is no cumulative error. *Hoskins v. State*, 75 So.3d 250 (Fla. 2011)(citing *Schoenwetter v. State*, 46 So.3d 535, 553, 562 (Fla. 2010)). It is only where multiple errors are found to have occurred, that the concept of cumulative error comes into play. *Mendoza v. State*, - So.3d - , -, 2011 WL 2652193, 7 (Fla. 2011). None of the five claims of ineffectiveness has any merit, therefore, the cumulative error claim is meritless as well.

While styled as an cumulative assistance of counsel claim, the claim actually seems to be an insufficiency of the evidence or a reasonable hypothesis of innocence claim. This Court in the direct appeal found the evidence sufficient to support McCoy's conviction for first-degree murder, observing that the "State introduced substantial evidence demonstrating the appellant's guilt" and "successfully rebutted McCoy's hypothesis of innocence." *McCoy*, 853 So.2d at 408. And no, Mr. McCoy certainly does not have a "logical explanation" for his fingerprints being on the ABC receipt bag. His explanation was rebutted by the prosecution at trial when the State called the manager of the motel McCoy claimed to have been staying at, Judy Roundtree of the Day's Inn motel near Roosevelt, who testified that McCoy's girlfriend was not registered at that time. (T. XII 1095). Moreover, this Court found the audiotape of McCoy's conversation with Zsa Zsa Marcel, where McCoy admitted to being inside the ABC liquor store at the time of the murder and discussed the statute of limitations for murder, to be "very clear." *McCoy*, 853 So.2d at 404 (stating that while some portion of the tape was inaudible, "significant parts of the recording are very clear."). Neither the fingerprints on the ABC receipt bag nor the audiotape were weakness in the State's case against McCoy. To the contrary, both the fingerprints and the audiotape were high cards in the State's case, just as this Court recognized in the direct appeal. There was no cumulative error.[6]

[6] This Court has stated that where several errors are identified, this Court "considers the cumulative effect of evidentiary errors and ineffective assistance claims together."

Lukehart v. State, 70 So.3d 503, 524 (Fla. 2011)(citing *Suggs v. State*, 923 So.2d 419, 441 (Fla. 2005)). The problem with cumulative error analysis is that it is "mix and match" law. The problem with cumulative error analysis is that it is an open admission that none of the individual errors warrants reversal but somehow together the errors do warrant reversal. So, for example, a defendant who cannot meet the three prongs of *Brady* or the two prongs of *Strickland*, says, yes, but I met two prongs of *Brady* and one prong of *Strickland*, so I'm entitled to reversal. This undermines the actual legal tests of both *Brady* and *Strickland*. The whole is greater than the sum of the parts according to the doctrine of cumulative error. And certainly direct appeal issues and post-conviction issues should not be considered cumulatively. This is mixing and matching direct appeal and postconviction claims.

Cumulative error should be limited to like claims. In other words, ineffectiveness claim can be combined with other ineffectiveness claims but not say a *Brady* claim. While not at issue here because McCoy's claim of cumulative error involves five claims of ineffectiveness which are properly considered together, the concept of cumulative error is not as expansive as some of the language in this Court's opinions suggests. It is limited to the same types of claims and to the same stage of the litigation.

ISSUE VII

WHETHER FLORIDA'S DEATH PENALTY STATUTE VIOLATES THE SIXTH AMENDMENT RIGHT TO A JURY TRIAL? (Restated)

McCoy asserts that his death sentence violates *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). First, this claim is procedurally barred because a *Ring* claim was raised in the direct appeal of this case. Furthermore, *Ring* does not apply to this particular case because the prior violent felony and the under-sentence-of-imprisonment aggravators are present. Recidivist aggravators are exempt from the holding in *Ring*. Furthermore, one of the aggravating circumstances found by the trial court was the during-the-course-of-a-felony aggravator. This Court has repeatedly held that *Ring* does not apply to cases where the jury convicts a defendant in the guilty phase of a separate felony. The jury unanimously convicted McCoy of the separate felony of armed robbery during the guilt phase. *Ring* was satisfied in the guilt phase in this particular case. Moreover, the jury necessarily found an aggravating circumstance when recommending a death sentence. In Florida, a jury must find an aggravating circumstance before recommending a death sentence. Florida's death penalty statute does not violate the Sixth Amendment right to a jury trial, as this Court has repeatedly held.

The trial court's ruling

McCoy raised a *Ring* claim in his post-conviction motion as claim XIV. The trial court denied the *Ring* claim noting that a *Ring* claim

was raised in the direct appeal. The trial court also noted that "two of the four aggravating circumstances were the 'prior violent felony' and the 'under the sentence of imprisonment.'" The trial court explained, citing cases in support, that the Florida Supreme Court has "held that Florida's capital sentencing procedure does not violate *Ring* when the case includes the prior violent felony aggravator" and that "the judge alone may find the aggravator that the murder was committed while the defendant is under a sentence of imprisonment." The trial court followed this Court's precedent which "has consistently rejected claims that Florida's death penalty scheme is unconstitutional based on *Ring*."

Standard of review

The standard of review is *de novo*. Constitutional challenges to statutes are reviewed *de novo*. *Miller v. State*, 42 So.3d 204, 215 (Fla. 2010)(stating "[w]e review a trial court's ruling on the constitutionality of a Florida statute de novo" regarding a Sixth Amendment challenge to Florida's death penalty scheme pursuant to *Apprendi* and *Ring*).

Procedural bar

This claim is barred by the law of the case doctrine. McCoy raised a *Ring* claim in the direct appeal. This Court rejected the *Ring* claim. *McCoy*, 853 So.2d at 409 (concluding McCoy was not entitled to relief on his *Ring* claim and noting that "a jury unanimously found McCoy guilty of armed robbery here, and it is undisputed that he was

previously convicted of violent felonies and was under a sentence of imprisonment at the time of the instant murder.). This claim is procedurally barred.

Merits

> The Sixth Amendment states:
> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The United States Supreme Court in *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) held that the Sixth Amendment requires that aggravating factors, necessary under Arizona law for imposition of the death penalty, be found by a jury. *Ring* was the application of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), to capital cases. Arizona's death penalty statute, which was at issue in *Ring*, was judge-only capital sentencing. Florida's death penalty statute, in contrast, as the *Ring* Court itself noted, is a hybrid system involving both a judge and a jury. *Ring*, 536 U.S. at 608, n.6, 122 S.Ct. at 2442, n.6 (noting that Arizona, like Colorado, Idaho, Montana and Nebraska, "commit both capital sentencing factfinding and the ultimate sentencing decision entirely to judges" and noting that four States, Alabama, Delaware, Florida and Indiana, "have hybrid systems, in which the jury renders an advisory verdict but the judge makes the ultimate

sentencing determinations."). Florida's scheme is jury plus judge sentencing, not judge only sentencing.

This Court has repeatedly, over the years, rejected *Ring* challenges to Florida's death penalty scheme. As this Court has recently noted: "we have repeatedly rejected constitutional challenges to Florida's death penalty under *Ring*." *Ault v. State*, 53 So.3d 175, 205-206 (Fla. 2010)(rejecting a *Ring* challenge to Florida's death penalty scheme citing *Bottoson v. Moore*, 833 So.2d 693 (Fla. 2002), and *King v. Moore*, 831 So.2d 143 (Fla. 2002)); see also *Caylor v. State*, - So.3d -, -, 2011 WL 5082614, 14 (Fla. 2011)(observing that "this Court has repeatedly held that Florida's death penalty does not violate *Ring*.")

Furthermore, *Ring* does not apply to this particular case because both the prior violent felony aggravator and the under-sentence-of-imprisonment aggravator are present. Recidivist aggravators are exempt from the holding in *Ring*. The United States Supreme Court exempted prior convictions from the holding of *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), explaining that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." The exception announced in *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), for prior convictions, survived *Apprendi* and *Ring*. *Tai A. Pham v. State*, 70 So.3d 485, 495-496 (Fla. 2011)(explaining that the express

exceptions to *Apprendi* were unaltered by *Ring*).[7] This Court has repeatedly rejected *Ring* claims where the prior violent felony aggravator is present. *Marshall v. Crosby*, 911 So.2d 1129, 1135 & n.6 (Fla. 2005)(explaining that prior violent felonies are an aggravating

[7] The continued validity of *Almendarez-Torres* has been questioned by several of the Justices as well as several courts. The United States Supreme Court's decision in *Oregon v. Ice*, 555 U.S. 160, 129 S.Ct. 711, 172 L.Ed.2d 517 (2009), upholding a judge's power to impose consecutive sentences without special findings by the jury, however, shows that *Almendarez-Torres* is alive and well.

Almendarez-Torres was correctly decided. The Sixth Amendment right to a jury trial is just that - a right to a jury - that is one jury. A defendant is entitled to one jury trial, not two. Frank R. Herrmann, *30=20: "Understanding" Maximum Sentence Enhancements*, 46 BUFF. L. REV. 175 (1998)(explaining that recidivism should be exempt from the elements rule because the defendant has already received a full trial and due process for the prior conviction and observing that the prior conviction received "the totality of constitutional protections" which distinguishes the use of prior convictions from other sentence enhancers and concluding that requiring full trial rights for the prior conviction would be "redundant".) Any defendant, who is a recidivist, has already had a jury find the underlying facts of the prior conviction at the highest standard of proof. The judge, in a recidivist situation, is merely taking judicial notice of a prior jury's verdict. With the prior violent felony aggravator which requires a conviction, a prior jury heard the evidence and found McCoy guilty beyond a reasonable doubt of the prior robberies. These prior juries completely satisfies the Sixth Amendment. McCoy is not entitled to two jury trials on his prior convictions.

Furthermore, the vast majority of criminal defendants plead. This means these defendants waived the right to a jury trial. If *Almendarez-Torres* is overruled, a defendant will have resurrected his right to a jury trial that he waived when he pled by the act of committing a second offense. Overruling *Almendarez-Torres* would create the odd result of unwaiver by criminal conduct. Moreover, the prosecution often agrees to a plea to avoid the time and trouble of a trial. For the prosecution to have to prove a crime years after it was committed, with all the attendant problems of lost evidence, missing witnesses and foggy memories, because the defendant committed another crime, seems to be a breach of the original plea agreement. *Almendarez-Torres'* logic is sound.

circumstance that takes a death sentence outside the scope of *Ring*'s requirements and collecting cases in a footnote); *Evans v. State*, 975 So.2d 1035, 1052-1053 (Fla. 2007)(rejecting a *Ring* claim where the prior violent felony aggravator was present citing *Duest v. State*, 855 So.2d 33, 49 (Fla. 2003)). And this Court has rejected *Ring* claims when the under-sentence-of-imprisonment aggravator is present as well. *Hodges v. State*, 55 So.3d 515, 540 (Fla. 2010)(stating that: "[t]his Court has repeatedly held that *Ring* does not apply to cases where the prior violent felony, the prior capital felony, or the under-sentence-of-imprisonment aggravating factor is applicable); *Smith v. State*, 998 So.2d 516, 529 (Fla. 2008)(stating: "We also have held that the aggravator of murder committed while under sentence of imprisonment may be found by the judge alone.").

McCoy had previously been convicted of three prior robberies and an attempted robbery and was on conditional release at the time of this robbery/murder. *McCoy*, 853 So.2d at 401 (noting that the State, during the penalty phase, introduced "judgments and sentences detailing McCoy's prior convictions for three counts of armed robbery and one count of attempted armed robbery" and noting that the State called Richard Hughes, McCoy's probation supervisor, to establish that the appellant was being supervised on conditional release at the time of the ABC Liquors robbery). Neither of these aggravators are required to be found by the jury under any view of *Ring*.

Moreover, if *Ring* applied and required that the jury find one aggravator, then *Ring* was satisfied in the guilt phase in this particular case. One of the aggravators found by the trial court was

the "during the course of a felony" aggravator. The jury unanimously found McCoy guilty of armed robbery in the guilt phase. The jury convicted McCoy by special verdict form of felony murder with armed robbery being the underlying felony. The jury also convicted McCoy of armed robbery with a firearm and discharging that firearm causing death in count II. Basically, the jury unanimously found this aggravator. *Ring* was satisfied before the penalty phase even began. As this Court recently reiterated, "*Ring* is not implicated when the trial court has found as an aggravating circumstance that the crime was committed in the course of a felony." *Baker v. State*, 71 So.3d 802, 824 (Fla. 2011)(citing *McGirth v. State*, 48 So.3d 777, 795 (Fla. 2010)(citing *Robinson v. State*, 865 So.2d 1259 (Fla. 2004)); see also *Cave v. State*, 899 So.2d 1042, 1052 (Fla. 2005)(rejecting a *Ring* claim because one of the aggravating circumstances was that the murder was committed in the course of two felonies which was found by the jury during the guilt phase); *Belcher v. State*, 851 So.2d 678, 685 (Fla. 2003)(rejecting a *Ring* claim and explaining that during a course of a felony aggravator was found by the jury in the guilt phase when the jury convicted the defendant of sexual battery). *Ring* is not violated in a case where the jury unanimously finds an aggravator in the guilty phase by convicting a defendant of a separate, underlying felony. So, two of the four aggravators found in this case are exempt from *Ring* and a third aggravator was found by the jury during the guilt phase.

Moreover, the jury recommended death thereby necessarily finding an aggravator. The United States Supreme Court, in *Jones v. United*

States, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999), a case that was a precursor to *Apprendi* and *Ring,* explained that Florida's death penalty does not violate the Sixth Amendment. It was a footnote in *Jones* stating "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt," that essentially became the holding in *Apprendi*. *Jones*, 526 U.S. at 243 n.6. The *Jones* Court explained that if there is a jury recommendation of death, the Sixth Amendment right to a jury trial is not violated. The *Jones* Court explained that in *Hildwin*, a Florida case, a jury made a sentencing recommendation of death, thus "necessarily engaging in the factfinding required for imposition of a higher sentence, that is, the determination that at least one aggravating factor had been proved." *Jones*, 526 U.S. at 251, 119 S.Ct. at 1228. See also *State v. Steele*, 921 So.2d 538, 546 (Fla. 2005)(explaining that a finding of an aggravator "is implicit in a jury's recommendation of a sentence of death" citing *Jones*). A jury in Florida is instructed that they may not recommend death unless they find an aggravator. So, a jury that recommends death has necessarily found at least one aggravator. According to both the United States Supreme Court in *Jones* and the Florida Supreme Court in *Steele*, a jury's recommendation of death means the jury found an aggravator which is all *Ring* requires.

McCoy's jury recommended death by a vote of seven to five. His jury necessarily found at least one aggravator in order to recommend

death. There can be no violation of the Sixth Amendment right to a jury trial where the defendant had a jury and that jury necessarily found an aggravator.

McCoy's reliance on *Evans v. Sec'y, Dep't of Corr.*, 2:08-cv-14402-JEM (S.D. Fla. June 20, 2011), is misplaced. First, a federal district court is a trial court and, like any other trial court, it's rulings are not binding precedent of any sort. As the United States Supreme Court has explained, a "decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case." *Camreta v. Greene*, - U.S. -, n.7, 131 S.Ct. 2020, 2033, n.7, 179 L.Ed.2d 1118 (2011). One federal district court judge's view certainly does not trump this Court's numerous and repeated holdings, over the last decade, that Florida's death penalty statute does not violate *Ring*.

Furthermore, *Evans* is distinguishable. As the district court in *Evans* itself noted, *Evans* did not involve the prior violent felony aggravator, the under-sentence-of-imprisonment aggravator, or the during-the-course-of-a-felony aggravator, as this case does. *Evans v. Sec'y, Dep't of Corr.*, 2:08-cv-14402-JEM at 80, n.25 citing *Coday v. State*, 946 So.2d 988, 1023 (Fla. 2006)(Pariente, J., dissenting on *Ring*). This case involves all three of these aggravators.

And most importantly, *Evans* is incorrectly decided and is due to be reversed by the Eleventh Circuit.[8] There is a special,

[8] Evans is pending on appeal in the Eleventh Circuit. *Sec'y, Fla Dep't of Corr., v. Evans*, 11-14498-P.

highly-deferential standard of review in federal habeas cases and the district court in *Evans* improperly refused to apply that standard. The Eleventh Circuit is highly likely to reverse on that basis alone. *Hill v. Humphrey*, 662 F.3d 1335 (11th Cir. 2011)(reversing a panel decision because the panel refused to apply the required AEDPA deference to the state court). Even under *de novo* review, *Evans* is incorrectly decided because the district court in *Evans* refused to follow controlling Supreme Court precedent of *Schad v. Arizona*, 501 U.S. 624, 111 S.Ct. 2491, 115 L.Ed.2d 555 (1991), which held that special verdicts are not required. The district court basically joined the dissent in *Schad* by requiring special verdicts regarding aggravators. District courts are not free to follow the dissent; rather, they must follow the majority opinion. The Eleventh Circuit will follow the majority in *Schad*. While the district court in *Evans* found the jury's recommendation to be meaningless, the United States Supreme Court thinks otherwise. In *Jones*, the United States Supreme Court found a jury recommendation of death to be quite meaningful. This Court should reject the reasoning of *Evans* and follow its long established precedent that Florida's death penalty statute does not violate *Ring*.

Harmless error

Furthermore, even if there had been a violation of the Sixth Amendment right to a jury trial, violations of the Sixth Amendment right to a jury trial, including *Ring* claims, are subject to harmless error analysis. *Neder v. United States*, 527 U.S. 1, 119 S.Ct. 1827,

144 L.Ed.2d 35 (1999)(finding that error in the judge determining the issue of materiality rather than properly submitting the materiality issue to the was harmless). A rational jury would have found an aggravator. Indeed, a rational jury would have found the exact same aggravators the judge did. A rational jury would have found the during-the-course-of-a-robbery aggravator if asked to complete a special verdict form given that they convicted McCoy of robbery with a firearm in the guilt phase. A rational jury would have also found the prior violent felony aggravator and the under-sentence-of-imprisonment aggravator if asked to do so. McCoy did not dispute that he had previously been convicted of three armed robberies and one attempted armed robbery in front of his penalty phase jury. Nor did he dispute the under-sentence-of-imprisonment aggravator. Any error was harmless.

The trial court properly denied the *Ring* claim. Accordingly, the trial court's order denying the claims of ineffectiveness following an evidentiary hearing and summarily denying the *Ring* claim should be affirmed.

CONCLUSION

The State respectfully requests that this Honorable Court affirm the trial court's denial of the 3.851 motion following an evidentiary hearing.

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL

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CHARMAINE M. MILLSAPS
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0989134
OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL, PL-01
TALLAHASSEE, FL 32399-1050
(850) 414-3300
COUNSEL FOR THE STATE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF has been furnished by U.S. Mail to David W. Collins, 310 North Jefferson Street, Monticello, FL 32344 this 6th day of February, 2012.

_____
Charmaine M. Millsaps
Attorney for the State of Florida

CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New 12.

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