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IN THE SUPREME COURT OF FLORIDA

CORNELIUS O. BAKER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. SC13-2331

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR FLAGLER COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

This case presents a postconviction appeal after Appellant was denied relief under Florida Rule of Criminal Procedure 3.851 (hereinafter Rule 3.851 or 3.851) in the Circuit Court for Flagler County, Florida. This brief will refer to Appellant as such, Defendant, or by proper name, e.g., "Baker." Appellee, the State of Florida, was the prosecution below; the brief will refer to Appellee as such, the prosecution, or the State.

Unless the contrary is indicated, bold-typeface emphasis is supplied; cases cited in the text of this brief and not within quotations are italicized; other emphases are contained within the original quotations.

STATEMENT OF THE CASE

Appellant was convicted and sentenced to death for the January 7, 2007, murder of Elizabeth Uptagrafft. This Court affirmed the conviction and sentence in a decision released on July 7, 2011. *Baker v. State*, 71 So. 3d 802 (Fla. 2011). The United States Supreme Court denied certiorari review on February 27, 2012. *Baker v. Florida*, 132 S.Ct. 1639, 182 L.Ed.2d 238 (2012).

Appellant filed a motion for post-conviction relief pursuant to *Florida Rule of Criminal Procedure* 3.851 on February 22, 2013. The State duly filed an answer to the motion, and a case management conference was held. Following an evidentiary hearing

held on September 16, 2013, the Flagler County Circuit Court issued an order denying relief on October 14, 2013. This appeal followed.

STATEMENT OF THE FACTS

As authorized by Fla.R.App.P. 9.210(c), the State submits its rendition of the case and facts. In its decision on direct appeal affirming Baker's conviction and death sentence, the Florida Supreme Court summarized the facts of the case to that point in the proceedings as follows:

> **Background**
>
> At the time of the offenses, Baker was living in Daytona Beach, Florida, with his girlfriend, Patricia Roosa. Baker had recently been released from jail, where he had been incarcerated for several months for selling drugs. Baker and Roosa decided that they wanted to move to New York. To get extra money for their move, they decided to rob a house using a pistol that Baker had recently stolen. On the morning of January 7, 2007, they walked around a Daytona Beach neighborhood until they found a house they could rob. Baker later told police that he and Roosa selected the Uptagrafft residence because it looked nice and they thought there might be money inside. Baker and Roosa walked to the front door. Baker told Roosa to ring the doorbell and that he would do the rest.
>
> Inside the house, Elizabeth Uptagrafft and her mother, Charlene Burns, had just finished eating breakfast. The only occupants of the house at the time were Elizabeth, Burns, and Elizabeth's adult son Joel Uptagrafft. Burns later stated that she thought they finished eating at approximately 8:30 or 9:00 a.m., and that Joel was still asleep at that time. After breakfast, Burns went to her bedroom to take a nap, while Elizabeth sat down on the couch in the living room to read. The doorbell rang a few moments later. When Elizabeth opened it, Baker came through the door and immediately hit her with his gun. The gun

discharged and the bullet grazed Elizabeth's head.

At trial, Burns testified that she heard a noise that sounded like someone kicking in the door, followed by a gunshot. Burns stated that after she entered the hallway outside her room that was connected to the living room, she was attacked by Baker, who beat, choked and kicked her. Burns said that Baker then told her to sit on the couch next to Elizabeth. When Burns saw Elizabeth's head wound, she yelled for her grandson, Joel. Joel came out of his room and was attacked by Baker, who beat Joel with the gun.

Burns estimated that the family was held at gunpoint for between two-and-a-half and three hours while Baker and Roosa searched the house for valuables. Burns stated that there was no money in the house, but said that Baker and Roosa found some jewelry and placed it in a bag. Elizabeth eventually offered Baker her ATM card and PIN code if they would leave. Baker did not believe that the PIN was real and told Elizabeth that she would have to come with them. According to Burns, Baker then said that if Elizabeth did not come with him, he would kill all three members of the family. Because Elizabeth was covered in blood from her head wound, Baker told her that she would have to change clothes before they left. Baker also told her to find a hat to cover the wound. Baker collected Elizabeth's cell phone and all other phones in the house. Before she left the house, Elizabeth whispered to her mother to call the police once Baker and Roosa were gone. Baker then placed Elizabeth, the phones, and the stolen jewelry into Elizabeth's car, and he and Roosa drove away from the house. Joel then walked to a neighbor's house and called the police.

Baker became nervous due to the number of police officers he saw in Daytona Beach, so he decided to drive to Flagler County to find an ATM. He later told police that his plan was to get the money and then to let Elizabeth go. While they were driving, Elizabeth asked for cigarettes and Baker gave them to her. She asked if Baker was going to let her live and he told her he was. At one point, Baker decided that he wanted to buy drugs. He drove to a house where he thought he could buy marijuana. However, Baker saw other people at the house and became afraid that someone would see Elizabeth in the car. He stated that he drove away

without going inside. Baker drove to a Winn-Dixie to try to get money from an ATM using Elizabeth's card. Roosa went into the store while Baker and Elizabeth waited in the car. When Roosa was unable to withdraw money from the Winn-Dixie ATM, she tried using an ATM at a nearby SunTrust Bank.

Finally, Baker decided to drive to a rural area of Flagler County known as the Mondex. Baker told police that it was his intention to drop Elizabeth off in a remote area where it would take her some time to find a phone that she could use to call the police. When they arrived at a spot that Baker thought was sufficiently isolated, Baker told Elizabeth to get out of the car, which she did. He also told her that she was going to live. According to Baker's statement to police, he then drove approximately fifteen feet before stopping the car and getting out. Baker said that Roosa told him, "Don't do it. Don't do it." Baker told the officers, "I felt like I done came this far." Baker said that Elizabeth started to run and that he ran after her. She ran into some nearby bushes, then tripped and fell. Baker fired two shots at her. He then went back to the car and drove away.

Detective Dale Detter, a homicide investigator with the Daytona Beach Police Department, was investigating another case when he was informed that a home invasion robbery and kidnapping had just occurred at a house on Michigan Avenue in Daytona Beach. After Detective Detter and other officers arrived at the house, they learned that Elizabeth Uptagrafft had been abducted, and that the abductors had taken her car and Bank of America ATM card. They also learned from Charlene Burns that the abductors had been given Elizabeth's PIN. Police put out a statewide be-on-the-lookout alert (BOLO) with details of the vehicle, Elizabeth's description, and specific instructions that officers should look for the abductors at Bank of America locations or ATMs.

At approximately 1:45 p.m., police officers received a call from Bank of America informing them that Elizabeth's ATM card had been used recently at two locations in Flagler County, first at a Winn-Dixie grocery store and then at a SunTrust bank. Sergeant Randy Burke of the Bunnell Police Department was on duty as a road patrol supervisor when the BOLO went

out shortly after 2:00 pm. The alert described the color, features and tag of the vehicle, advised that there were two occupants, a black male and a black female, and stated that the victim's debit card had been used recently near the intersection of I-95 and State Road 100. The alert stated that the victim might be in the vehicle as well.

As the BOLO was still going out, Sergeant Burke observed a vehicle parked in an alleyway that matched the description of the one given in the alert. Sergeant Burke pulled closer and verified that the license plate number was the one described in the alert. As Sergeant Burke moved closer, the vehicle began to pull out of the alley and onto the street. Sergeant Burke called for backup and attempted to initiate a traffic stop. The vehicle began to flee when Sergeant Burke activated his lights and sirens. A high-speed chase began through a residential area, with the pursued vehicle, driven by Baker, travelling at more than 75 miles per hour while weaving around persons and other vehicles.

Eventually, Baker's vehicle crashed into a fence and came to a stop. Baker got out of the car and fled through a gate in the fence. Sergeant Burke was unable to apprehend Baker at that time, but took Roosa into custody. He then conducted a search of the vehicle. In the front seat he observed a hat with blood on it, two portable house phones, several spent shell casings, and one unfired bullet. Sergeant Burke directed other officers to set up a perimeter. Shortly thereafter, officers discovered Baker hiding in a nearby house. Baker later stated that after he ran from Officer Burke he threw the gun away in a field.

Baker was taken to the Flagler County Sheriff's Office, where he was interviewed by Sergeant Jakari Young, a homicide investigator with the Daytona Beach Police Department, and Detective Daniel Diaz. After Baker was given *Miranda*[1] warnings, Sergeant Young asked Baker where they could find Elizabeth Uptagrafft. Baker first said that Patricia Roosa had nothing to do with what had happened. He then stated:

> Only thing I care about in life, I care about my daughter, and I really care about my—my girlfriend.... [I]f I can just get to

> kiss my girlfriend, and I swear to God, I tell you [sic] anything you want to know. And I tell you where to find the lady, and I show you where to find the lady. Do that, I'll even sing for you.

> [FN1] *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Detective Diaz asked if Elizabeth was okay. Baker responded, "She might be a little hurt." The officers eventually agreed that Baker would be allowed to see Roosa if he agreed to tell them where they could find Elizabeth. Baker told them that she was in the Mondex and that he did not know whether she was still alive. Baker admitted that she was first injured at the house when he hit her with a pistol and the pistol fired. Baker also explained how the robbery occurred, where he and Roosa went after they kidnapped Elizabeth, how he threw away the gun after leaving Elizabeth in the Mondex, and how he hid after being identified and chased by police. Baker also described how he shot Elizabeth after letting her out of the car. During the course of the interrogation, other officers entered the room with a map and Baker showed them where they could find Elizabeth. The interrogation ended when Baker said that he did not want to talk anymore. Shortly thereafter, Roosa was brought into the room and Baker was allowed to speak with her. Baker then rode with officers to the Mondex, where Elizabeth's body was discovered.

On January 19, 2007, Baker and Roosa were jointly indicted by a grand jury for the offenses of first-degree murder,[2] home invasion robbery with a firearm, kidnapping, conspiracy, and burglary of a structure or conveyance. Baker was also indicted for aggravated fleeing and eluding a law enforcement officer.

> [FN2] The indictment alleged both first-degree premeditated murder and first-degree felony murder. *See* § 782.04(1) (a) 1.–2., Fla. Stat. (2006).

Guilt Phase

The guilt phase of Baker's trial began on August 20, 2008. The trial was held in the Seventh Judicial

Circuit in Flagler County. As its first witness, the State called Charlene Burns, who described her memories of the robbery and identified Baker as the person who committed the acts. The State also called several police officers to testify regarding Baker's pursuit, capture, and interrogation. Among these witnesses was Sergeant Young, who identified the recording of Baker's interrogation, which was played to the jury.

The State called other witnesses to describe physical evidence recovered in the investigation. One of the State's forensic witnesses was Dr. Terrance Steiner, who was admitted as an expert in forensic pathology. Dr. Steiner stated that he performed the autopsy on Elizabeth Uptagrafft's body. In his testimony, Dr. Steiner first described a graze injury on the left side of the victim's head, then described a second injury in which a bullet had entered the left side of her neck, travelled almost straight down through her chest fracturing three ribs, then exited at the left side of her lower back. Dr. Steiner stated that both wounds had resulted in bruising and bleeding, indicating that the victim was alive when they were inflicted. Additionally, a third gunshot wound had been inflicted to the left side of Elizabeth's forehead. Dr. Steiner noted that red and black specks were present in a four-inch area surrounding the gunshot wound. He stated that these specks were caused by "stippling," which occurs when unburnt gunpowder is driven into the skin due to the proximity of the gunshot. Based on the presence of stippling, Dr. Steiner concluded that the gunshot was delivered within eighteen inches of the victim's forehead. Dr. Steiner stated that the gunshot wound to the forehead would have been immediately fatal, and that because the other wounds showed vital reaction, it would have been the last of the three wounds to have been inflicted.

At the end of the guilt phase, the jury returned a verdict finding Baker guilty of one count each of first-degree murder, home invasion robbery, kidnapping, and aggravated fleeing and eluding a law enforcement officer.

Penalty Phase

In the penalty phase of the trial, the State presented two victim impact statements. The first statement was written by Charlene Burns and was read in court by Brenda Gillespie, Elizabeth Uptagrafft's sister. The second statement was written jointly by Elizabeth's four children and was read in court by Elizabeth's son Joel. The State presented no additional penalty phase testimony.

The first defense witness was Dr. Harry Krop, a psychologist. Dr. Krop testified that Baker was one of four siblings and that Baker's parents were neglectful and physically abusive toward their children. Baker's mother used alcohol and drugs during her pregnancy, while Baker's father was sent to prison while Baker was young. Dr. Krop said that according to Baker's older brother, the children were often unsupervised and began engaging in criminal activity at a young age to earn money. Dr. Krop stated that Baker began using marijuana at the age of twelve and that he began drinking heavily at the age of sixteen.

With regard to Baker's mental health history, Dr. Krop testified that Baker was diagnosed with a speech impediment, borderline intellectual ability, and attention deficit hyperactivity disorder when he was seven years old. Dr. Krop stated that his own testing, conducted in 2007, showed that Baker had an IQ of 81. Based on this testing, Dr. Krop estimated that Baker had a mental age of fourteen or fifteen. He also referred Baker for neurological testing. Baker's MRI was normal, but the results of a PET scan showed deficiencies in the frontal area of his brain. Dr. Krop diagnosed Baker with the following impairments: (1) attention deficit disorder; (2) an unspecified cognitive disorder resulting from frontal lobe impairment; (3) polysubstance abuse; and (4) antisocial personality disorder. When asked whether he believed Baker qualified for any statutory mitigating circumstances, Dr. Krop responded that he believed Baker was suffering from an extreme mental or emotional disturbance throughout his life and at the time of the offense.

The defense also presented Baker's mother and two sisters as witnesses. Baker's mother, Jessica Smith, testified that she drank beer and gin and smoked marijuana while she was pregnant with Baker. Smith

described Baker's speech problems as a child, and stated that he was held back in kindergarten and was placed in special education classes and on Ritalin.

Cornelius Baker testified in his own defense. Baker said that his father was not present when he was a child and that his mother drank and used drugs and often left the children alone. He said that he stuttered as a child, had problems reading, and often got into fights as a result of other children making fun of an eye injury he sustained when he was five years old. Baker also stated that he started drinking and selling cocaine and marijuana at a young age. He met Roosa when they were both in the ninth grade and they later moved in with his mother. In January 2007, he had just been released from the county jail where he had been incarcerated for selling crack cocaine. Baker said that Roosa had recently been fired from her job and they needed money. Regarding the crime itself, Baker said that he was remorseful for what he had done and that he wanted to help the victim's family by confessing and telling police where they could find the body.

After Baker's testimony, the defense rested. The jury subsequently returned a recommendation in favor of death by a vote of nine to three.

Spencer **Hearing**

A *Spencer*[3] hearing was held on November 21, 2008. The defense introduced records of Baker's mental health and childhood into the record, including psychiatric evaluations, medical records, and school reports. The court was also given a pre-sentence investigation report (PSI) that was prepared by the Florida Department of Corrections.

[FN3] *Spencer v. State,* 615 So. 2d 688 (Fla. 1993).

During the hearing, the defense played two videos that were taken at the time Elizabeth's body was discovered by police. In one of the videos, Baker is shown admitting to a television reporter that he committed the murder. When asked whether he wanted to say anything to the victim's family, Baker responded that he was sorry for what happened. Baker's two sisters

testified again on behalf of the defense. Both described Baker's difficult childhood and stated that Baker had frequently shown remorse. Baker also testified at the hearing and again expressed remorse for the crime. When asked on cross-examination why he killed Elizabeth, he responded that he "just freaked out." Patricia Roosa was also called as a witness, and her testimony largely corroborated Baker's description of the events surrounding the murder. No further witnesses were presented.

Sentencing Order

In the trial court's sentencing order, the court found that the following aggravating factors had been proven beyond a reasonable doubt: (1) the crime was committed while the defendant was engaged in the commission of, or an attempt to commit, the crime of home invasion robbery or kidnapping; (2) the capital felony was committed for pecuniary gain (great weight);[4] (3) the capital felony was especially heinous, atrocious, or cruel (great weight); and (4) the capital felony was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification (great weight).

> [FN4] The court considered the first two factors as a single aggravator, stating: "When a homicide occurs during the course of a robbery, the felony-murder aggravator and the pecuniary-gain aggravator cannot both apply. *Francis v. State,* 808 So. 2d 110, 136–37 (Fla. 2001). As a result, the home invasion robbery/kidnapping theory and the pecuniary gain aspect will be considered together as one aggravating factor."

As statutory mitigation, the court found: (1) the crime was committed while the defendant was under the influence of extreme mental or emotional disturbance (some weight);[5] and (2) the age of the defendant (twenty years old) at the time of the crime (some weight). As nonstatutory mitigation, the court found: (1) the defendant suffers from brain damage, low intellectual functioning, drug abuse and that those factors are compounded by each other (some weight); (2) the defendant was born into an abusive household and was neglected as a child (some weight); (3) the

> defendant is remorseful (little weight); (4) the defendant was well behaved and displayed appropriate demeanor during all court proceedings (little weight); and (5) the defendant's confession and cooperation with police (some weight).
>
> > [FN5] The court rejected Baker's argument that he was under the influence of "*extreme* mental or emotional disturbance" (trial court's emphasis), but nonetheless explained that Baker's personal background and medical and psychiatric history were entitled to some weight as mitigation.
>
> The trial court determined that the aggravating circumstances far outweighed the mitigating circumstances and sentenced Baker to death for the charge of first-degree murder. The court also sentenced Baker to life imprisonment for the charge of home invasion robbery with a firearm, life imprisonment for the charge of kidnapping, and fifteen years' imprisonment for the charge of aggravated fleeing and eluding a law enforcement officer.

Baker v. State, 71 So. 3d 802, 808-13 (Fla. 2011).

Postconviction Evidentiary Hearing

Appellant filed a Motion for Postconviction Relief (hereinafter "Motion") after this Court affirmed his death sentence on direct appeal. Of the six (6) claims Appellant raised in his Motion, the parties agreed Appellant's claim of ineffective assistance of counsel for trial counsel's failure to proffer Appellant's apology letter was the only claim that required an evidentiary hearing. At the evidentiary hearing, Appellant called trial counsel, Matthew Phillips, Esq., ("Phillips") to testify. Phillips was the only witness called to testify at the evidentiary hearing.

Phillips testified that he has been an attorney for twenty three (23) years and has served as an assistant public defender for over twenty (20) years. (V11, R575).[1] Phillips further testified that he has been a board certified trial specialist since 2006 and has conducted over one hundred seventy five (175) jury trials, including sixteen (16) murder trials, five (5) of which involved the death penalty. (V11, R576).

When asked about his recollection of his examination of Appellant during the penalty phase and Appellant's letter of remorse, Phillips explained,

> Mr. Baker expressed remorse to me from the first day that I met him. . . By the time we got to the penalty phase, we were discussing how to express this remorse. . . And one of the things I've always talked about is trying to, you know, speak from the heart. Make it seem really sincere. Try to develop eye contact with the jury or the judge . . . And what I recall about Mr. Baker's case, I'm – I'm – I discourage my clients from writing something out. I think that the delivery of remorse loses something if my client is reading from a document.

(V11, R580-82).

Phillips stated he was surprised when Appellant pulled the letter out of his coat pocket because the night before Appellant testified at the penalty phase Phillips and Appellant had discussed how Appellant should convey his remorse. (V11, R583-

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[1] Citations to the direct appeal record are as follows: DAR, V_, R_. Citations to the postconviction appeal record are as follows: V_, R_.

84).

When asked about his recollection as to what happened to the letter after Appellant attempted to read it to the jury, Phillips testified:

> The prosecutor, Mr. Cline, objected, Judge Hammond sustained the objection. I can remember just telling him, like, you know, I can remember thinking, like, fine. Put it away, anyway. Just turn and look at the jury and tell them the remorse that you've been wanting to express for, you know, more than a year now. And I -- what I recall was that he did turn and kind of face the jury and - - and was working on making eye contact like I had suggested and was doing what I hoped, more of a speaking from the heart and making his presentation of remorse. And then with it -- when he was done, I could actually remember thinking . . . well, he did a pretty good job . . . of getting his remorse across. And I'm not really sure what happened to the letter, but I -- I kind of think he just folded it up and put it back into the coat pocket. And, unfortunately, I didn't think of proffering it. . . So I think the letter just went back with him, probably, back to the county jail, but I -- I never physically had the letter.

(V11, R584-85).

THE POST CONVICTION TRIAL COURT ORDER

On October 14, 2013, the trial court issued an Order Denying Motion for Postconviction Relief (hereinafter "Order"). The Order first addressed Claims II – V which raised constitutional challenges to death penalty laws and procedures which have previously been ruled upon by this Court. Claim II alleged that the Rule Regulating the Florida Bar 4-3.5(d)(4) which prohibits party attorneys from interviewing jurors after the conclusion of the case violated Appellant's right to equal

protection. *Motion* at 18. Upon consideration of the merits of Claim II, the trial court found, "this Court is bound by the Florida Supreme Court's ruling that has held this restriction does not violate a defendant's constitutional rights. *Reese v. State*, 14 So.3d 913, 919 (Fla. 2009)." (V3, R571). The trial Court also cited to Fla. R. Crim. P. 3.575 which sets forth a procedure whereby a party may move the court for permission to interview a juror under limited circumstances. (V3, R572).

Claim III alleged that the trial court's instructions to the jury during the penalty phase unconstitutionally diminished the jury's sense of responsibility in determining the proper sentence and further alleged that trial counsel was ineffective for failing to litigate this issue. (V1, R172). Citing *Barwick v. State*, 88 So. 3d 85, 108-109 (Fla. 2011), the trial court denied this claim noting that this Court "has previously held that the standard jury instructions given during the penalty phase . . . do not diminish the jury's sense of responsibility." (V3, R572). The trial court also found that trial counsel was "not ineffective for failure to raise a nonmeritorious claim." *Id* at 102. (citation omitted).

Claim IV challenged the constitutionality of the Florida capital sentencing statute based on the United States Supreme Court decisions in *Apprendi v. New Jersey,* 530 U.S. 466 (2000) and *Ring v. Arizona, 536 U.S. 584 (2002)*. (V1, R173-77). The

trial court denied this claim noting that this Court in *Cox v. State*, 819 So. 2d 705, 724-725 (Fla. 2002) previously held that there is no reason to require the State to notify defendants in its indictments of aggravating factors it intends to prove (*Apprendi* claim) because all of the possible aggravating factors are detailed in section 921.141(5) of the Florida Statutes. (V3, R572). The trial court also denied Appellant's *Ring* claim (which contended that the aggravating factors found in this case constituted the functional equivalent of an element of a greater offense which must be found by a unanimous jury), based upon the fact that Appellant had "raised this issue on direct appeal where it was rejected. *Baker v. State*, 71 So. 3d at 823-824." *Id*. The trial court also noted that "*Ring* is inapplicable where the trial court has found as an aggravating factor that the crime was committed in the course of a felony; a unanimous jury found Baker guilty of the home invasion robbery and kidnapping." *Id*. (citation omitted).

Claim V alleged that Florida's capital sentencing statutes and rules unconstitutionally fail to prevent the arbitrary and capricious imposition of the death penalty and additionally alleged that Florida's use of lethal injection constitutes cruel and unusual punishment. (V1, R177-79). Appellant additionally claimed counsel was ineffective for failing to litigate these claims. *Id*. The trial court rejected these claims, ruling:

> The United State[s] Supreme Court has held the Florida capital sentencing procedures assure that the death penalty will not be imposed in an arbitrary or capricious manner. *Proffitt v. Florida*, 428 U.S. 242 (1976). The Florida Supreme Court has repeatedly reviewed and upheld the constitutionality of Florida's August 2007 lethal injection protocol. *See Tomkins v. State*, 994 So. 2d 1072, 1080-1082 (Fla. 2008). These claims being without merit, trial counsel cannot be found to be deficient/ineffective for failure to raise them at trial or direct appeal.

(V3, R572-73).

Claim I of Appellant's Motion alleged that his trial counsel provided ineffective assistance by failing to proffer Appellant's apology letter after it was ruled irrelevant by the trial court. *Motion* at 10. The trial court considered Phillips' testimony regarding his strategy for the presentation of Appellant's remorse and the circumstances surrounding Appellant's letter and found that "[c]ounsel's strategic decision was reasonable given that counsel repeatedly elicited statements of regret and remorse from the Defendant." (V3, R573). The trial court's order further states:

> This Court does not find counsel's strategy to fall below the wide range of professionally competent assistance or that there is a reasonable probability the result of the proceedings would have been different if the letter had been proffered, thereby satisfying the *Strickland v. Washington* test. 466 U.S. 668 (1984).

(V3, R573).

Because the trial court denied all of Appellant's individual claims of error, the court further found Appellant's claim of

cumulative error (Claim VI) to be without merit. (V3, R574). Baker now appeals, raising various issues.

SUMMARY OF THE ARGUMENT

Issue I: The postconviction trial court correctly found Appellant's claim of ineffectiveness of counsel for counsel's failure to proffer Appellant's apology letter to be without merit. Counsel's strategy to have Appellant make better eye contact with and appear more sincere to the jury by testifying about his remorse from the heart, rather than by reading an apology letter, was reasonable. This claim is also refuted by the record. Counsel presented a substantial amount of evidence of Appellant's remorse which ultimately convinced the trial court to find that Appellant was remorseful and give Appellant's remorse weight towards mitigation. Under the circumstances, Appellant's apology letter was clearly cumulative evidence and its omission from the evidence presented and from the record did not undermine confidence in the outcome of Appellant's case.

Issue II: Appellant's claim that Florida's rule prohibiting defense counsel from interviewing jurors is unconstitutional under the federal and Florida constitution is procedurally barred, lacking in appropriate foundation, and meritless under settled Florida law. Although procedures are in place for Appellant to seek permission to interview jurors, Appellant failed to file a Notice of Intention to Interview pursuant to

Florida Bar Rule 4-3.5(d)(4). Appellant also failed to raise this claim on direct appeal rendering such procedurally barred. Further, similar claims which have been appropriately raised on appeal have been expressly rejected by this Court.

Issue III: Appellant's claims that Florida Statute Section 921.141 is unconstitutionally vague and overbroad and that the instructions given to the jury unconstitutionally diminished the jury's sense of responsibility are procedurally barred, insufficiently plead and meritless under settled Florida law. Appellant failed to raise these issues on direct appeal, rendering these arguments procedurally barred. Appellant failed to allege what portions of the statute are "facially vague and overbroad" rendering his pleadings in this regard insufficient to warrant relief. This Court and the Unites States Supreme Court have both rejected claims alleging that Florida Statute Section 921.141 is overly broad and vague, and defense counsel's alleged ineffectiveness for failure to raise these claims is clearly refuted by the record.

Issue IV: Appellant's death sentence did not violate the United States Supreme Court holdings in *Apprendi v. New Jersey* or *Ring v. Arizona*. Appellant's *Apprendi* claim is procedurally barred because it was not raised at trial or on direct appeal and is meritless under settled state law. Appellant's *Ring* claim is procedurally barred because this Court has already

decided the constitutionality of Appellant’s death sentence under *Ring* on direct appeal. Appellant cannot use post-conviction proceedings as a second appeal to relitigate the same issue.

Issue V. Appellant’s claim that Florida Statue Section 921.141 does not prevent the arbitrary and capricious imposition of the death penalty is contrary to well settled state and federal law. The United States Supreme Court has held that the Florida capital-sentencing procedures seek to assure that the death penalty will not be imposed in an arbitrary or capricious manner. Accordingly, Appellant’s claim lacks merit and should be summarily denied.

Issue VI. Appellant’s cumulative error claim fails because there has been no “error” to “cumulate.”

STANDARDS OF REVIEW

The issues raised herein regarding the constitutionality of statutes are pure questions of law which are subject to *de novo* review. *Troy v. State*, 948 So. 2d 635, 643 (Fla. 2006). Appellant’s ineffective assistance of counsel claims are governed by the *Strickland v. Washington*, 466 U.S. 668 (1984) standard. Because both prongs of the *Strickland* test present mixed questions of law and fact, this Court employs a mixed standard of review, deferring to the circuit court's factual findings that are supported by competent, substantial evidence

but reviewing the circuit court's legal conclusions de novo. *Bates v. State*, 3 So. 3d 1091, 1100 (Fla. 2009) (*citing Sochor v. State*, 883 So. 2d 766, 771-72 (Fla. 2004).

ARGUMENT

ISSUE I

TRIAL COUNSEL WAS NOT INEFFECTIVE FOR HIS FAILURE TO PROFFER APPELLANT'S APOLOGY LETTER AND THE RECORD REFUTES APPELLANT'S CLAIM OF PREJUDICE.

Appellant contends his trial counsel was ineffective for failing to proffer Appellant's apology letter at the penalty phase, "thereby failing to preserve the issue for direct appeal." *Initial Brief* at 7. After conducting an evidentiary hearing concerning this issue, the court below found that trial counsel's conduct did not "fall below the wide range of professionally competent assistance." (V3, R573). This finding is wholly supported by the evidence and otherwise consistent with the law.

The standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984) provides guidance for the consideration of ineffective assistance of counsel claims. This Court has described that standard as follows:

> In *Strickland* . . . the Court established a two-pronged standard for determining whether counsel provided legally ineffective assistance. A defendant must point to specific acts or omissions of counsel that are "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. The defendant also must

> establish prejudice by "show[ing] that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability is a "probability sufficient to undermine confidence in the outcome." *Id.; see Gaskin v. State*, 737 So. 2d 509, 516 n.14 (Fla. 1999) ("Prejudice, in the context of penalty phase errors, is shown where, absent the errors, there is a reasonable probability that the balance of aggravating and mitigating circumstances would have been different or the deficiencies substantially impair confidence in the outcome of the proceedings.")

Reese v. State, 14 So. 3d 913, 917 (Fla. 2009).

Phillips' testimony concerning the circumstances of Appellant's apology letter in relation to his strategy for conveying Appellant's remorse was significant to the postconviction court's analysis of Appellant's ineffective assistance of counsel claim. When asked about his recollection of Appellant's apology letter, Phillips explained:

> By the time we got to the penalty phase, we were discussing how to express [Appellant's] remorse. . . And one of the things I've always talked about is trying to, you know, speak from the heart. Make it seem really sincere. Try to develop eye contact with the jury or the judge. . . And what I recall about Mr. Baker's case, I'm – I'm – I discourage my clients from writing something out. I think that the delivery of remorse loses something if my client is reading from a document.

(V11, R580-82).

Phillips further testified he was "surprised" when Appellant pulled the letter out of his coat pocket because on the night before Appellant testified at the penalty phase, Phillips and Appellant had discussed counsel's opinion as to how Appellant

should convey his remorse. (V11, R583-84).

In *Strickland*, the United States Supreme Court cautioned that:

> [a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.

466 U.S. at 689.

In the instant case, Phillips' strategy to have Appellant make better eye contact with and appear more sincere to the jury by testifying about his remorse from the heart, rather than by reading an apology letter, was based on his professional judgment and experience[2] and clearly falls within the wide range of reasonable professional assistance required by *Strickland*. Although counsel admittedly forgot to proffer Appellant's apology letter after the trial court sustained the State's

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[2] Phillips testified that he has been an attorney for twenty three (23) years and served as an assistant public defender for over twenty (20) years. Phillips also testified that he has been a board certified trial specialist since 2006 and has conducted over one hundred seventy five (175) jury trials, including sixteen (16) murder trials, five (5) of which involved the death penalty. (V11, R575-76).

relevance objection,[3] it is clear from the following testimony that counsel's reasonable belief that Appellant did a good job relaying his remorse[4] contributed to this oversight:

> MR. PHILLIPS: . . . I can remember thinking, like, fine. Put [the letter] away, anyway.
>
> Just turn and look at the jury and tell them the remorse that you've been wanting to express for, you know, more than a year now.
>
> And I -- what I recall was that he did turn and kind of face the jury and - - and was working on making eye contact like I had suggested and was doing what I hoped, more of a speaking from the heart and making his presentation of remorse.
>
> And then with it -- when he was done, I could actually remember thinking . . . well, he did a pretty good job, that he did a pretty good job of getting his remorse across.
>
> And I'm not really sure what happened to the letter, but I -- I kind of think he just folded it up and put it back into the coat pocket.
>
> And, unfortunately, I didn't think of proffering it.

(V11, R584-85).

Counsel is not ineffective for failing to present duplicative or cumulative evidence of a single mitigating factor, *Darling v. State*, 966 So. 2d 366, 378 (Fla. 2007) (*citing Gudinas v. State,* 816 So. 2d 1095, 1106 (Fla. 2002)*; see*

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[3] In response to the State's relevancy objection, the trial Court stated, "It probably serves no purpose at this time. I will give you an opportunity to do it at a later time on the record." (DAR, V18, R184).

[4] Trial counsel did not stand alone in his assessment that Appellant had done a good job relaying his remorse. The trial court ultimately found that Appellant "is remorseful." (V4, R570).

also Sweet v. State, 810 So. 2d 854, 863-64 (Fla. 2002) and a claim of ineffective assistance of counsel for failure to investigate and present mitigation evidence will not be sustained where **the jury was aware of most aspects of the mitigation evidence that the defendant argues should have been presented**. *Frances v. State/Crews*, 39 Fla. L. Weekly S257 (Fla. Apr. 17 2014) (*citing Troy v. State,* 57 So. 3d 828, 835 (Fla. 2011) (emphasis added). There is no question that the copious amount of remorse-based evidence presented, identified more specifically *infra,* made the jury "aware of most aspects of Appellant's remorse." Appellant's apology letter is also a prime example of "duplicative or cumulative evidence of a single mitigating factor," *to wit*, Appellant's remorse. Accordingly, this Court should affirm the trial court's finding that counsel's conduct did not fall below the wide range of professionally competent assistance required by *Strickland*.

Although the State maintains that trial counsel's performance did not fall below the wide range of professionally competent assistance, the State respectfully contends that this Court does not need to make a specific ruling on the performance component of the *Strickland* test because it is abundantly clear that the prejudice component is lacking and refuted by the record. *See Maxwell v. Wainwright*, 490 So. 2d 927, 932 (Fla. 1986)(A court considering a claim of ineffectiveness of counsel

need not make a specific ruling on the performance component of the test when it is clear that the prejudice component is not satisfied). The postconviction court found that there was not a "reasonable probability the result of the proceedings would have been different if the letter had been proffered." *Order* at 4. In support of its ruling, the trial court noted that Appellant's trial counsel "repeatedly elicited statements of regret and remorse from the Defendant." *Id*. This finding is supported by a plethora of competent and substantial evidence and it should be entitled to deference by this Court. *Bates v. State*, 3 So. 3d 1091, 1100 (Fla. 2009) (holding this Court employs a mixed standard of review, deferring to the circuit court's factual findings that are supported by competent, substantial evidence but reviewing the circuit court's legal conclusions *de novo*. *See Sochor v. State*, 883 So. 2d 766, 771-72 (Fla. 2004)).

The evidence of Appellant's remorse began during trial counsel's direct examination of Appellant during the penalty phase:

> MR. PHILLIPS [defense counsel]: Okay. And, you know, you've had a lot of time to think about what happened that day. What are your thoughts on that now?
>
> APPELLANT: I just - - I just can't believe I did something like that, because like my sister say, I'm not - - I'm real kind, and I do things. I do get in trouble and stuff. I do things I shouldn't do. But I really don't know what happened to – - I really don't know what happened that day. I can't really say what happened.

MR PHILLIPS: And how do you feel about it now? I mean - -

APPELLANT: I feel real bad. I feel terrible. I felt the same when it happened. I did the best I could to, you know, help the family out by just going ahead and confessing to what I did and, you know, showing them where the body was and stuff like that.

MR. PHILLIPS: Were you crying there at the end of that interrogation?

APPELLANT: I cried before the interrogation, and I cried at the end, yeah. Yes, I did.

MR. PHILLIPS: And, you know, what would you tell Ms. Uptagrafft's family now about the situation?

APPELLANT: That I'm very sorry and I wish I could change the past, but I can't change the past.

MR. PHILLIPS: And do you feel like you feel real remorse about this tragedy?

APPELLANT: I felt that way - - just not now. I felt that way since the day when it happened, since it happened.

(DAR, V18, R178-179).

Trial counsel then revisited the topic of Baker's remorse on redirect:

MR. PHILLIPS: Mr. Baker, why was it you didn't apologize to Ms. Uptagrafft's family sooner?

APPELLANT: Because nobody gave me a chance.

MR. PHILLIPS: And you've been at the county jail the whole time. Right?

APPELLANT: Yes.

MR. PHILLIPS: And I told you there would be an opportunity to do that later, didn't I?

APPELLANT: Yes, you did.

> MR. PHILLIPS: And is there anything else you'd like to say to the family, now that you have that opportunity?
>
> APPELLANT: Well, I took my time last night and I wrote a apology letter to the family. It's not long, but it's from my heart. And I'd like to read the letter.
>
> MR. PHILLIPS: Would that be possible, Your Honor?
>
> THE COURT: Any objection?
>
> MR. CLINE [prosecutor]: I don't see the relevance of it at this point. He's already said he was sorry.
>
> THE COURT: It probably serves no purpose at this time. I'll give you an opportunity to do it at a later time on the record.
>
> Mr. Phillips: But, Mr. Baker, do you genuinely feel bad about what happened?
>
> APPELLANT: Yes, I do.
>
> MR. PHILLIPS: And do you really feel bad for Ms. Uptagrafft's family?
>
> APPELLANT: I feel bad for my family, not only their family, but my family, too. But I really feel bad for their family.

(DAR, V18, R183-184).

Trial counsel continued submitting evidence of Appellant's remorse beyond the penalty phase. At Appellant's *Spencer* hearing, trial counsel introduced a video of a television news station's coverage of Appellant's crimes which contained the following interview:

> FEMALE SPEAKER: Do you want to say anything to her family?

> APPELLANT: I'm Sorry. I'm very sorry. If I can go back and change what happened, I would. You know, I'm not -- I'm not a violent person. Got it wrong.
>
> FEMALE SPEAKER: But you did sh -- you killed her.
>
> APPELLANT: Uh-huh.

(DAR, V20, R47-48).

Counsel subsequently submitted the following additional evidence of Appellant's remorse:

> MR. PHILLIPS: Okay. Now, do you remember the interrogation with the detectives?
>
> APPELLANT: Yes. I remember that part.
>
> MR. PHILLIPS: How did you feel when that was going on? I mean, did you feel about what had happened -- feel bad about what happened?
>
> APPELLANT: Yes.
>
> MR. PHILLIPS: Did you feel bad about causing Ms. Uptagrafft's death?
>
> APPELLANT: Yes.
>
> MR. PHILLIPS: How about those videos we saw? When you took them out to the woods and you were leading them to where she was, were you crying at that point?
>
> I know it's tough to remember, but what do you remember about that?
>
> APPELLANT: It was hard because I knew I had did something wrong. And, you know, it was eating at me that if somebody was did that to my mother or my grandmother or anybody in my family like that.
>
> So I was crying and breaking up, but I just want to, you know, to help them find Ms. Uptagrafft and, you know, get over with this thing.
>
> MR. PHILLIPS: Now, how about when you -- you

> remember talking -- you saw the clip with the television reporter
>
> APPELLANT: Yes.
>
> MR. PHILLIPS: Were you feeling bad about the situation at that point?
>
> APPELLANT: I was feeling bad the whole time.
>
> MR. PHILLIPS: Okay. Were you -- were you -- were you genuinely expressing remorse at that time?
>
> APPELLANT: Yes, sir.
>
> MR. PHILLIPS: And how about when you met with your sisters at the jail? Were you feeling remorse during this -- these times you've met with them?
>
> APPELLANT: All the time because I don't like looking at them -- I couldn't look at their face because I know I did something bad.
>
> And I disappointed my mom, my family and them. I really don't like to come visited -- visiting, to tell you the truth.

(DAR, R20, R81-83).

Near the conclusion of Appellant's *Spencer* hearing testimony, counsel elicited even more remorse based testimony, *to wit*:

> MR. PHILLIPS: Okay. Well, kind of sum it up. What did you want to tell Judge Hammond that you wanted to get off your chest?
>
> APPELLANT: That I was sorry and, you know, I'm ready to accept my punishment like a man and get it over with.
>
> You know, I want to tell the family I'm sorry and I wish I could take it back any time, but I can't.
>
> It's something I know they'll live with the rest of their life, and it's something I live with the rest of my life, being locked up behind bars . . .
>
> And I want to say sorry to the Roosa family for

putting their daughter in a predicament like this.

(DAR, V20, R84).

In light of all of the remorse-based evidence presented in Appellant's case, Appellant's contention that his apology letter amounted to anything more than cumulative evidence of his remorse is tenuous at best. In addition to the lack of prejudice which exists in this case due to the cumulative nature of Appellant's apology letter, lack of prejudice is also evidenced by the trial court's finding that Appellant "is remorseful." (DAR, V4, R570). While Appellant takes exception with the amount of weight the trial court attributed to his remorse, indisputable facts which could not logically be refuted by an apology letter contradicted Appellant's alleged concern for the victim.

The trial court only gave Appellant's remorse "little weight" towards mitigation because it was "impossible to tell if [Appellant's] concern was for the victim or himself" because Appellant bargained for things in exchange for his cooperation with the investigation.[5] *Id.* While not specifically noted by the trial court in its sentencing order, the fact that Appellant also eluded law enforcement in a high speed car chase and was

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[5] Appellant negotiated for a cigarette and a kiss from his girlfriend before he agreed to lead investigators to the victim's body. *Id.*

ultimately apprehended against his will[6] further belies Appellant's alleged concern for the victim. In light of these indisputable facts, Respondent respectfully contends that even if Appellant drafted the most meaningful apology letter ever written by one convicted of first degree murder, his apology letter would not have allayed the concerns the trial court had in giving Appellant's remorse anything more than little weight. Further, even if Appellant's letter somehow convinced the court to give more weight to Appellant's remorse, such would not have affected the outcome of Appellant's case because the trial court found that the overall mitigation was "far outweighed" by the aggravating factors. *Id.* at 11.

Appellant also cannot establish the prejudice prong of *Strickland* by alleging that counsel's failure to make the apology letter a part of the record prejudiced him in his direct appeal because the prejudice analysis applies to the trial court proceeding, not to the direct appeal. *Carratelli v. State*, 961 So. 2d 312, 322-323 (Fla. 2007). The postconviction trial court's factual findings concerning Appellant's claim of ineffective assistance of counsel are supported by competent and

[6] Appellant was found guilty of aggravated fleeing and eluding a law enforcement officer. *Baker* at 808. The police chase ended when Appellant crashed the victim's vehicle into a fence, exited the vehicle and ran. Police found Appellant hiding in a nearby house. *Id.* at 810.

substantial evidence and its legal conclusions are wholly supported by the evidence and consistent with the law. This Court should affirm the postconviction court's denial of this claim.

ISSUE II

DEFENDANT'S CLAIM THAT FLORIDA'S RULE PROHIBITING DEFENSE COUNSEL FROM INTERVIEWING JURORS IS UNCONSTITUTIONAL UNDER THE FEDERAL AND FLORIDA CONSTITUION IS PROCEDURALLY BARRED, LACKING APPROPRIATE FOUNDATION AND MERITLESS UNDER SETTLED FLORIDA LAW.

Appellant asserts that the postconviction court erred in denying Appellant's claim that Florida Bar Rule 4-3.5(d)(4) violates the First, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and corresponding provisions of the Florida Constitution as well as Equal Protection principles. *Initial Brief* at 14. However, the postconviction court did not commit reversible error in summarily denying this claim because it is procedurally barred, lacking in appropriate foundation, and otherwise meritless.

This Court has repeatedly held that this claim is procedurally barred if not raised on direct appeal. *Reese v. State*, 14 So. 3d 913, 919 (Fla. 2009); *Spencer v. State*, 842 So. 2d 52, 72 (Fla. 2003); *Arbelaez v. State*, 775 So. 2d 909, 919 (Fla. 2000); *Young v. State*, 739 So. 2d 553, 555 n.5 (Fla. 1999). Appellant failed to raise this claim during his direct appeal proceedings (*See Baker v. State*, 71 So. 3d 802 (Fla.

2011) and the postconviction court's summary denial of such must accordingly be affirmed.

If this claim is not procedurally barred, summary denial was nevertheless appropriate because Appellant's claim lacked sufficient foundation. It appears from a plain reading of the heading of "Issue 2" of Appellant's Initial Brief that Appellant alleges that rules exist in Florida which prohibited Appellant's trial lawyers from interviewing jurors to determine if constitutional error was present.[7] Such is not the case. Florida Bar Rule 4-3.5(d)(4) grants attorneys who are connected to a case the right to seek permission from the trial court to conduct juror interviews. A party's request to interview a juror must be based on counsel's reasonable belief that the verdict may be subject to legal challenge. *Vining v. State*, 827 So. 2d 201, 216 (Fla. 2002) (citing R. Regulating Fla. Bar 4-3.5(d)(4)). The notice must set forth the names of any jurors to be interviewed. *Vining,* 827 So. 2d at 216. In the instant case, Appellant failed to file a Notice of Intention to Interview pursuant to Florida Bar Rule 4-3.5(d)(4).

Appellant also failed to allege at any time in these

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[7] Appellant's claim was stated as follows, "The postconviction court erred when it denied Mr. Baker's claim that **the rules prohibiting his lawyers from interviewing jurors** to determine if constitutional error was present violates. . ." *Initial Brief* at 14 (emphasis added).

proceedings that any juror misconduct took place, and there is nothing in the record to support such. Absent any substantiating factual allegations, Appellant’s claim constitutes a purely speculative request to conduct what the Florida Supreme Court has referred to as "fishing expedition interviews." *Arbelaez,* 775 So. 2d at 919. These interviews amount to an impermissible review of the jury’s deliberations and should not be used to support a motion for post-conviction relief. *Vining,* 827 So. 2d at 216; *Johnson v. State,* 593 So. 2d 206, 210 (Fla. 1992).

Appellant notes in his Initial Brief that neither this Court nor the trial court have ever addressed why nonparties may conduct “fishing expeditions” with former capital trial jurors without restriction. *Initial Brief* at 15. However, this point is unpersuasive because of the patently logical basis for the rule. When jury members come to a verdict, they choose a winner and a loser; such is the nature of our adversarial system of justice. It stands to reason that jurors may be uncomfortable speaking with a party to the litigation, particularly the losing party, as opposed to academics, journalists and other nonparties. Florida Bar Rule 4-3.5(d)(4) simply protects jurors from unfettered questioning about their decisions from the losing party in litigation, be it the defendant or the State. To allow otherwise would make an already difficult task for a

juror even more unpleasant. Appellant's claim that "[c]riminal defense counsel are treated differently, unfairly and unequally" (*see Initial Brief* at 17) is a distortion of the reality of the rule. Criminal defense attorneys are treated no differently than any other party that is connected to a jury trial case.

Finally, this Court has expressly rejected Appellant's claim that Florida Bar Rule 4-3.5(d)(4) violates his constitutional right to Equal Protection. *Reese*, 14 So. 3d at 919 (holding rules prohibiting attorneys from interviewing jurors after trial did not violate capital murder defendant's right to equal protection in pursuing post-conviction relief (citing *Barnhill v. State,* 971 So.2d 106, 117 (Fla.2007)); *see also Johnson v. State,* 804 So. 2d 1218, 1225 (Fla. 2001); *Arbelaez,* 775 So. 2d at 920. Accordingly, this Court should follow well-settled Florida law and find that this claim is procedurally barred, lacking in foundation, or alternatively, otherwise affirm the trial court's ruling that this claim is without merit.

ISSUE III

A. DEFENDANT'S CLAIM THAT SECTION 921.141 OF THE FLORIDA STATUTES IS FACIALLY VAGUE AND OVERBROAD IS PROCEDURALLY BARRED, INSUFFICIENTLY PLED AND OTHERWISE WITHOUT MERIT.

Appellant's claim that Section 921.141 of the Florida Statutes is facially vague and overbroad is procedurally barred.

In *Nelson v. State*, 43 So. 3d 20 (Fla. 2010), this Court held that Nelson was procedurally barred from contesting the constitutionality of Section 921.141 of the Florida Statutes because he failed to raise this claim during his direct appeal. *Id.* at 34 (citing *Breedlove v. Singletary,* 595 So. 2d 8, 10 (Fla. 1992)). Like Nelson and Breedlove, Appellant failed to raise this claim during his direct appeal. *See Baker v. State*, 71 So. 3d 802 (Fla. 2011). As such, Appellant's claim is procedurally barred and was properly denied below.

This claim was also insufficiently pled. Appellant's constitutional challenge to the Florida Statute in question consisted of nothing more than a single conclusory allegation contained in the heading of his Motion and Initial Brief.[8] Appellant's Motion failed to allege what portions of the statute are "facially vague and overbroad." Accordingly this claim was insufficiently pled to warrant relief and the postconviction court's denial of such should be affirmed on appeal. *Pope v. Sec'y, Dept. of Corr.,* 680 F.3d 1271, 1290 (11th Cir. 2012) (stating a trial court must summarily deny a claim for post-

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[8] (*Motion* at 23); (*Initial Brief* at 17-18). The bodies of these arguments briefly discuss Appellant's claim that the jury instructions improperly diminished the jury's sense of responsibility, but make no further mention of the contention that appears in the heading which claims Florida Statute 921.141 is unconstitutionally vague and overbroad.

conviction relief unless it presents a colorable claim for relief); *Moreno v. Sec'y, Dept. of Corr.*, 2:09-CV-336-FTM-29, 2012 WL 2282552, at 7 (M.D. Fla. June 18, 2012) ("The Defendant bears the burden of establishing a *prima facie* case based upon a legally valid claim. **Mere conclusory allegations are not sufficient to meet this burden**.") (quoting *Freeman,* 761 So. 2d at 1061)(emphasis added).

Furthermore, the Supreme Courts of the United States and Florida have both rejected claims that Section 921.141 of the Florida Statutes is overly broad and vague. *Proffitt v. State,* 428 U.S. 242, 256 (1976); *Dufour v. State,* 905 So. 2d 42, 69 (Fla. 2005); *Card v. State,* 803 So. 2d 613, 628 (Fla. 2001); *Blanco v. State,* 706 So. 2d 7, 11 (Fla. 1997). Appellant's claim is therefore also clearly contrary to well-settled law and this Court should affirm the postconviction court's summary denial of such.

B. THE TRIAL COURT'S INSTRUCTION TO THE JURY THAT ITS ROLE WAS ADVISORY WAS NOT UNCONSTITUTIONAL.

Appellant contends that the trial court unconstitutionally diminished the jury's sense of responsibility by instructing the jury that its role was advisory. *Initial Brief* at 17. However, this claim is also contrary to well-settled law in Florida. The Florida Supreme Court has "repeatedly held the standard jury instructions [given during the penalty phase] fully advise the jury of the importance of its role, correctly state the law, and

do not denigrate the role of the jury." *Reese*, 14 So. 3d at 920 (*quoting Barnhill,* 971 So. 2d at 117); *see also Miller*, 926 So. 2d at 1257; *Rodriguez*, 919 So. 2d at 1280; *Combs v. State,* 525 So. 2d 853, 855-56 (Fla. 1988).[9]

The post conviction trial court was bound by the legal precedent set forth by this Court and did not err in denying Appellant's claim. The court below correctly noted that the Florida Supreme Court "has previously held that the standard jury instructions given during the penalty phase . . . do not diminish the jury's sense of responsibility." *Order* at 3. Accordingly, this claim is meritless and this Court should affirm its denial by the court below.

C. TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO LITIGATE THE AFOREMENTIONED CLAIMS.

Appellant contends that trial counsel was ineffective to the extent he failed to litigate the aforementioned claims. Appellant's claim fails on multiple grounds. First, Appellant's claim is clearly refuted by the record. During the course of Appellant's representation, trial counsel filed multiple motions contesting the constitutionality, and specifically the overly broad and/or vague nature, of various sections of Florida

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[9] In *Combs*, this Court specifically held that the decision cited by Appellant in support of this claim, *Caldwell v. Mississippi*, 472 U.S. 320 (1985), is inapplicable to death penalty cases in Florida. *Id*.

Statute 921.141. (DAR1, R105-146); (DAR1, R147-185); (DAR2, R186-213); (DAR3, R371-401). Moreover, counsel repeatedly challenged the constitutionality of the standard jury instructions given during Appellant's trial. (DAR1, R63-85); (DAR2, R186-213); (DAR2, R214-227); (DAR2, R266-328). As such, trial counsel cannot be ineffective for failing to raise these claims.

Secondly, Appellant's claim was insufficiently pled. Appellant failed to allege that trial counsel's performance was deficient and prejudicial or otherwise establish such during the evidentiary hearing. *Strickland,* 466 U.S. at 687. Appellant merely made a conclusory allegation that trial counsel was ineffective in the headings of his Motion and Initial Brief while including no discussion of the merits of this claim in the body of his arguments. (*Motion* at 23); (*Initial Brief* at 17-18). These naked allegations are insufficient to warrant post-conviction relief. *Dennis v. State*, 38 Fla. L. Weekly S1 (Fla. Dec. 20, 2012) (holding that defendant is not entitled to post-conviction relief for ineffective assistance of counsel where he does not sufficiently allege deficiency or prejudice); *see also Pope*, 680 F.3d at 1290.

Lastly, because Appellant's constitutional challenges to Section 921.141 of the Florida Statutes and the standard penalty phase jury instruction fail under well settled Florida law,

Appellant’s claims for ineffective assistance of counsel must fail as well. *See Reese*, 14 So. 3d at 920 (holding that trial counsel could not be ineffective for failing to object to constitutionally valid jury instructions). Appellant’s claim of ineffective assistance of counsel fails on multiple grounds, and the postconviction court’s summary denial of such must therefore be affirmed.

ISSUE IV

A. APPELLANT’S DEATH SENTENCE DOES NOT VIOLATE APPRENDI V. NEW JERSEY.

Appellant claims his death sentence is unconstitutional under the principles set forth in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *Initial Brief* at 19-20. While it is unclear whether Appellant challenged his indictment under *Apprendi* prior to trial, (DAR2, R252-257), Appellant clearly failed to raise an *Apprendi* claim on direct appeal. *See Baker v. State*, 71 So. 3d 802 (Fla. 2011). Accordingly, this claim is procedurally barred. *Gudinas,* 879 So. 2d at 618 (*Apprendi* claim was procedurally barred because it was not brought during direct appeal).

Furthermore, this Court has held that *Apprendi* does not apply to Florida’s death penalty scheme. *Cox v. State,* 819 So. 2d 705, 724-25 (Fla. 2002) (holding since all of the possible aggravating factors are detailed in section 921.141(5) of the Florida Statutes, “there is no reason to require the State to

notify defendants of the aggravating factors it intends to prove” (quoting *Vining v. State,* 637 So. 2d 921, 927 (Fla. 1994)); *see also Mills v. Moore,* 786 So. 2d 532, 537 (Fla. 2001). Since this claim is not only procedurally barred but also lacking in legal merit, its summary denial should be affirmed.

B. APPELLANT’S DEATH SENTENCE DOES NOT VIOLATE RING V. ARIZONA.

Appellant also argues that his death sentence is unconstitutional under the principles set forth in *Ring v. Arizona,* 536 U.S. 584 (2002). *Initial Brief* at 18. This argument fails for three distinct reasons. First, Appellant’s claim is procedurally barred because he has already challenged, and the Florida Supreme Court has already decided, the constitutionality of Baker’s death sentence under *Ring* on direct appeal. *Baker,* 71 So. 3d at 823-24. Appellant cannot use post-conviction proceedings as a second appeal to relitigate the same issue. *Schoenwetter v. State,* 46 So. 3d 535, 561 (Fla. 2010).

Second, *Ring* is inapplicable where the trial court has found as an aggravating circumstance that the crime was committed in the course of a felony, and a unanimous jury found Appellant guilty of multiple qualifying felonies. *Baker,* 71 So. 3d at 824 (*citing McGirth v. State,* 48 So. 3d 777, 795 (Fla. 2010)); *Cave v. State,* 899 So. 2d 1042, 1052 (Fla. 2005); *Robinson v. State,* 865 So. 2d 1259, 1265 (Fla. 2004) (“This

Court has held that the aggravators of murder committed 'during the course of a felony' and prior violent felony involve facts that were already submitted to a jury during trial and, hence, are in compliance with *Ring.*")(citations omitted). A unanimous jury found Appellant guilty beyond a reasonable doubt of home invasion robbery with a firearm, armed kidnapping, and aggravated fleeing and eluding a law enforcement officer, all of which are violent felonies. *Baker*, 71 So. 3d at 811. Subsequent to these jury findings, the trial court found that said violent felonies constituted an aggravating circumstance to the first degree murder of Elizabeth Uptagrafft. *Id.* at 813. Accordingly, *Ring* is inapplicable to Appellant's case.

Lastly, the Florida Supreme Court has "repeatedly and consistently rejected claims that Florida's capital sentencing scheme is unconstitutional under *Ring*." *Baker,* 71 So. 3d at 824 (*quoting Darling,* 966 So. 2d at 387); *see also Bottoson v. Moore,* 833 So. 2d 693, 695 (Fla. 2002). Accordingly, Appellant's *Ring* claim is procedurally barred, inapplicable to the facts of his case and contrary to well-settled Florida law. The postconviction court's decision to summarily deny such was proper and should be affirmed by this Court on appeal.

ISSUE V

A. FLORIDA'S CAPTIAL SENTENCING STATUTE PREVENTS THE ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY.

Appellant argues that Section 921.141 of the Florida Statutes[10] does not prevent the arbitrary and capricious imposition of the death penalty. However, the United States Supreme Court specifically addressed this issue in *Proffitt v. Florida,* 428 U.S. 242 (1976) and held:

> The Florida capital-sentencing procedures thus seek to **assure that the death penalty will not be imposed in an arbitrary or capricious manner**. Moreover, to the extent that any risk to the contrary exists, it is minimized by Florida's appellate review system, under which the evidence of the aggravating and mitigating circumstances is reviewed and reweighed by the Supreme Court of Florida "to determine independently whether the imposition of the ultimate penalty is warranted."

Id. at 252-53 (*quoting Songer v. State*, 322 So. 2d 481, 484 (1975)(emphasis added).

The United States Supreme Court also observed that, "[t]he Supreme Court of Florida . . . has not hesitated to vacate a death sentence when it has determined that the sentence should not have been imposed." *Id.* at 253. Accordingly, Appellant's claim lacks merit and the trial court's summary denial of such

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[10] Appellant refers generally to "Florida's capital sentencing scheme" and "Florida's death penalty statute." *Initial Brief* at 22. It is presumed that Appellant is referring to Section 921.141 of the Florida Statutes.

should be affirmed. *Bottoson*, 833 So. 2d at 695; *Hildwin v. Florida,* 490 U.S. 638 (1989); *Spaziano v. Florida,* 468 U.S. 447 (1984); *Barclay v. Florida,* 463 U.S. 939 (1983).

B. FLORIDA'S METHOD OF EXECUTION IS NOT CRUEL AND UNUSUAL UNDER THE EIGHTH AMENDMENT.

Appellant claims that Florida's method of execution by lethal injection "impose[s] unnecessary physical and psychological torture without commensurate justification, and therefore constitutes cruel and unusual punishment in violation of the Eighth Amendment of the United States." *Initial Brief* at 23. However, the Florida Supreme Court has reviewed Florida's lethal injection procedures several times and has consistently found they do not constitute cruel and unusual punishment. *Valle v. State,* 70 So. 3d 530, 541 (Fla. 2011), *cert. denied*, 132 S.Ct. 1 (2011); *Smith v. State*, 998 So. 2d 516, 529 (Fla. 2008); *Lightbourne v. McCollum,* 969 So. 2d 326, 353 (Fla. 2007), *cert. denied,* 553 U.S. 1059 (2008); *Schwab v. State,* 969 So. 2d 318, 325 (Fla. 2007); *Provenzano v. State*, 761 So. 2d 1097, 1099 (Fla. 2000). Furthermore, the current lethal injection protocol utilizing midazolam hydrochloride, vecuronium bromide, and potassium chloride has repeatedly been upheld as constitutional. *Howell v. State*, 133 So. 3d 511, 517 (Fla. 2014); *Muhammad v. State*, 132 So. 3d 176 (Fla. 2013); *Chavez v. State*, 132 So. 2d 826 (Fla. 2014); *Henry v. State*, 134 So. 3d 938 (Fla. 2014). Given the extensive review of this issue by the Florida Supreme

Court and the abundance of well-settled legal precedent opposing Appellant's claim, said claim was clearly meritless and this Court should affirm the postconviction court's decision to summarily deny it.

C. TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO LITIGATE THE AFOREMENTINED CLAIMS.

Appellant further contends that his trial counsel was ineffective to the extent he failed to litigate the aforementioned claims. *Initial Brief* at 23-24. This claim fails on multiple grounds. First, Appellant's claim is insufficiently pled because he failed to allege deficient conduct and prejudice as required by *Strickland*. 466 U.S. at 687; *see also Pope,* 680 F.3d at 1290; *Motion* at 30. Second, counsel is not ineffective for failing to raise, as argued *supra*, meritless claims. *See Reese*, 14 So. 3d at 920. Third, this claim is clearly refuted by the record in light of trial counsel's extensive arguments that Florida's death penalty scheme is imposed in an arbitrary and capricious manner and/or is cruel and unusual punishment. (DAR1, R89-94); (DAR1, R95-104); (DAR1, R105-146); (DAR1, R147-185); (DAR2, R186-213). The postconviction court's summary denial of this claim was appropriate under the circumstances and this Court should affirm.

ISSUE VI

DEFENDANT'S CUMULATIVE ERROR CLAIM IS PROCEDURALLY BARRED AND WITHOUT MERIT

Appellant asserts that he is entitled to relief because the combination of procedural and substantive errors in his guilt and penalty phases "virtually dictated" his death sentence, *Initial Brief* at 24, however, there have been no errors to cumulate in the instant case. As more specifically argued *supra*, Appellant's cumulative error claim is procedurally barred and insufficiently pled to the extent that the errors Appellant seeks to cumulate are procedurally barred or insufficiently pled. Further, Appellant's claims of error that are not procedurally barred are otherwise meritless. "Where individual claims of error alleged are either procedurally barred or without merit, the claim of cumulative error must fail." *Griffin v. State*, 866 So. 2d 1, 22 (Fla. 2003) (citing *Downs v. State,* 740 So. 2d 506, 509 n. 5 (Fla. 1999).

Interestingly, Appellant raises a new claim within his cumulative error argument. Within Appellant's cumulative error argument, Appellant states for the first time in his 3.851 proceedings that his appellate counsel was ineffective for failing "to ensure that this Court had the complete record of the trial for the direct appeal." *Initial Brief* at 24. This claim is out of order in these proceedings.

Any reference to appellate counsel's ineffectiveness in the instant appeal is procedurally barred and should not be considered by this Court when evaluating Appellant's claim of cumulative error. "Claims of ineffective assistance of appellate counsel are appropriately raised in a petition for writ of habeas corpus." *Frances* at 14. (citing *Brown v. State*, 846 So. 2d 1114, 1127 (Fla. 2003)). Furthermore, since Appellant's ineffective assistance of appellate counsel claim was not raised in Appellant's Motion for Postconviction Relief, the court below was unable to rule on its merits. Accordingly, this Court should not reach the merits. *Lukehart v. State*, 103 So.3d 134, 135 (Fla. 2012) ("because the postconviction court did not rule on the merits, we do not reach the merits of his claim.")

Accordingly, the State respectfully contends there is no error to cumulate in Appellant's case and the denial of Appellant's cumulative error claim should be affirmed.

CONCLUSION

Based on the foregoing arguments and authorities, the State respectfully requests this Honorable Court affirm the denial of Appellant's requests for postconviction relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 24, 2014, I electronically filed the foregoing using the e-portal system which will send notice of filing and serve an electronic copy to the following: Richard E. Kiley, Assistant CCRC-Middle, kiley@ccmr.state.fl.us; Ann Marie Mirialakis, Assistant CCRC-Middle, mirialakis@ccmr.state.fl.us; and support@ccmr.state.fl.us; Capital Collateral Regional Counsel-Middle, 3801 Corporex Park Drive, Suite 210; Tampa, FL 33619-1136.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Courier New 12 point font.

Respectfully submitted and certified,

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