Filing # 13223041 Electronically Filed 05/02/2014 03:13:53 PM

RECEIVED, 5/2/2014 15:18:38, John A. Tomasino, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA
CASE NO. SC13-2331

CORNELIUS O. BAKER,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT IN AND FOR FLAGLER COUNTY, FLORIDA
Lower Tribunal No. 2007-CF-000033

INITIAL BRIEF OF THE APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT REGARDING ORAL ARGUMENT

The resolution of the issues in this action will determine whether Mr. Baker lives or dies. This Court has allowed oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be appropriate in this case, given the seriousness of the claims involved and the fact that a life is at stake. Mr. Baker accordingly requests that this Court permit oral argument.

CITATION KEY

The record on direct appeal of Mr. Baker's trial shall be cited as "ROA" followed by the volume and page numbers. The record of Mr. Baker's postconviction proceeding shall be cited as "PCR" followed by the volume and page numbers.

STATEMENT OF THE CASE AND FACTS

The procedural history and facts presented at the trial were summarized by this Court in its direct appeal opinion. In part, they are as follows:

> On January 19, 2007, Baker and co-defendant Patricia Roosa were jointly indicted by a grand jury for the offenses of first-degree murder, (FN2 - [t]he indictment alleged both first-degree premeditated murder and first-degree felony murder), 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.
> . . .
> The guilt phase of Baker's trial began on August 20, 2008. The trial was held in the Seventh Judicial Circuit in Flagler County.
> . . .
> 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.
> . . .
> (At the end of the penalty phase) [t]he jury subsequently returned a recommendation in favor of death by a vote of nine to three.
>
> Baker v. State, 71 So.3d 802, 811-812 (Fla. 2011).

Subsequent to the hearing required by Spencer v. State, 615 So.2d 688 (Fla.1993), the trial court entered a sentencing order that was described by this Court as follows:

> 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); (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."); (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).

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); (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); 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).

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, 813 (Fla. 2011).

The judgment and sentences in this case were affirmed on appeal by this Court on July 7, 2011. Baker v. State, 71 So.3d 802 (Fla. 2011). A timely motion for rehearing was denied on September 21, 2011. The defendant filed a petition for writ of *certiorari* to the U.S. Supreme Court; the petition was denied on February 27, 2012. Baker v. Florida, 132 S.Ct. 1639 (2012).

Mr. Baker filed his Motion for Postconviction Relief pursuant to Florida Rule of Criminal Procedure 3.851 on February 22, 2013. PCR V1 150-207. The defendant raised 6 claims. The postconviction court denied all the claims on October 15, 2013. PCR V3, 570-598.

SUMMARY OF THE ARGUMENT

Issue 1: Trial counsel was ineffective and prejudiced his client's case by his failure to proffer Mr. Baker's letter of apology and make it a part of the record of the trial.

Issue 2: The rules denying counsel the right to interview jurors are unconstitutional. Access to jurors is necessary to assure the jury was not tainted by impermissible influences or otherwise acted in an unconstitutional manner. The blanket prohibition imposed on counsel is unconstitutional and denies

defendants adequate assistance of counsel.

Issue 3: Caldwell claim. Florida's jury instructions unconstitutionally diminish the jury's responsibility in sentencing.

Issue 4: Death sentence statute unconstitutional as applied. The state and federal constitutions require that penalty phase juries must unanimously find each aggravating factor to exist.

Issue 5: Death sentence statute unconstitutional on its face and as applied. Florida's sentencing scheme fails to guarantee that the death penalty is not arbitrarily imposed or that it will be imposed only on the worst offenders.

Issue 6: Cumulative error. Each claim raised in postconviction justifies relief, but, to the extent any single one fails to rise to that level, the claims in combination and in totality require a new trial and resentencing.

STANDARDS OF REVIEW

The constitutionality of statutes are pure questions of law and are, therefore, subject to *de novo* review. See Troy v. State, 948 So. 2d 635, 643 (Fla. 2006). To successfully prove a claim of ineffective assistance of trial counsel, a defendant must satisfy both prongs of the test provided by Strickland v. Washington, 466 U.S. 668 (1984) as follows:

> First, the claimant must identify particular acts or omissions of the lawyer that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards. Second, the clear, substantial deficiency shown must further be demonstrated to have so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined.

Simmons v. State, 105 So. 3d 475, 487 (Fla. 2012) (quoting Ferrell v. State, 29 So. 3d 959, 969 (Fla. 2010) (quoting Maxwell v. Wainwright, 490 So. 2d 927, 932 (Fla. 1986) (citations omitted))). Because ineffective assistance of counsel claims present mixed questions of fact and law, the 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).

There is a strong presumption, however, that trial counsel's performance was not ineffective, and judicial scrutiny of counsel's performance is highly deferential. See Strickland, 466 U.S. at 689-90. To assess attorney performance, courts must eliminate the distorting effects of hindsight and evaluate the challenged conduct from counsel's perspective at the time. Id. at 689. The defendant carries the burden to overcome the presumption that the challenged action may be considered sound trial strategy. Id. (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)). "[S]trategic decisions do not constitute ineffective

assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct." Occhicone v. State, 768 So. 2d 1037, 1048 (Fla. 2000).

The Court does not reach both Strickland prongs in every case. "[W]hen a defendant fails to make a showing as to one prong, it is not necessary to delve into whether he has made a showing as to the other prong." Preston v. State, 970 So. 2d 789, 803 (Fla. 2007) (quoting Stewart v. State, 801 So. 2d 59, 65 (Fla. 2001)).

ARGUMENT

ISSUE 1

MR. BAKER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL IN THE PENALTY PHASE OF HIS TRIAL IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION. TRIAL COUNSEL WAS INEFFECTIVE BY FAILING TO PROFFER HIS CLIENT'S LETTER OF APOLOGY, THEREBY FAILING TO PRESERVE THE ISSUE FOR DIRECT APPEAL.

Cornelius Baker testified at his own penalty phase. (ROA XVIII 167-184) He recounted his deprived upbringing and dysfunctional family. He explained his problems in school, his eye injury, and his speech impediment. (ROA XVIII 168-173). He expressed feeling remorse at the time of the murder and at trial. He explained that he tried to help the family out by confessing and leading police to her body. (ROA XVIII 178-179). He also admitted that he cried before and after

his confession as well as when he lead police to the body. (ROA XVIII 178-179).

On cross examination, the prosecutor began:

> MR. CLINE [prosecutor]: Mr. Baker, how many times did you try to extend your heartfelt apology to the family of Elizabeth Uptagrafft? How many times did you attempt to do that?
>
> MR. PHILLIPS [defense counsel]: Your Honor, I object to that.
>
> MR. CLINE: Your Honor, they opened the door.
>
> THE COURT: I think he can ask that question, how many times.
>
> MR. CLINE: How many times, before today, before your trial, after· being convicted of first degree premeditated murder, did you extend your heartfelt apology to that family? How many times?
>
> APPELLANT: None, because - - none.
>
> (ROA XVIII 179).

The prosecutor continued his questioning, asking Baker if he hated or had ill will toward Ms. Uptagrafft. Baker admitted that she was simply a random victim of crime. (ROA XVIII 179-180). The prosecutor then questioned Baker about the details of the actual shooting. (ROA XVIII 180-181). Subsequently, the prosecutor returned to the subject of apology:

MR. CLINE: Mr. Baker, during the hour-plus long interview you gave with the law enforcement folks, Flagler County Sheriff's Office and Daytona Beach Police Department, do you recall ever asking to extend any kind of apologies to the victim's family? Did you ever ask them to let them know that you were sorry?

APPELLANT: No.

(ROA XVIII 181).

On redirect, defense counsel attempted to mitigate the damage done on cross:

MR. PHILLIPS: Mr. Baker why was it you didn't apologize to Mr. 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.

(ROA XVIII 183).

When the trial court asked the state if there was any objection, the prosecutor stated:

> MR. CLINE: 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.
>
> (ROA XVIII 184).

Appellant then testified that he genuinely felt bad about what happened, felt for his family, and felt for the victim's family. (ROA XVIII 184). However, the jury never got the opportunity to hear Baker's letter of apology. Although the trial court indicated that there would be an opportunity to proffer the letter, the record does not reflect that proffer. Postconviction counsel further notes that trial counsel properly provided his files and all information pertaining to the case pursuant to Fla.R.Crim.P. 3.851(c)(4). However, the subject letter was not located among the defense materials so provided.

" ... [T]he right to present evidence on one's own behalf is a fundament right basic to our adversary system of criminal justice, and is a part of the 'due process of law' that is guaranteed to defendants in state criminal courts by the Fourteenth

Amendment to the federal constitution." Gardner v. State, 530 So.2d 404, 405 (Fla. 3d DCA 1988), citing Faretta v. California, 422 U.S. 806 (1975); Washington v. Texas, 388 U.S. 14 (1967) (right to call witnesses and present a defense is fundamental to due process of law); Amends. VI and XlV, U.S. Const.; Article I, §§ 9, 16, and 22; Fla. Const. There is a "low threshold for relevance" that must be met regarding what evidence a capital defendant may introduce in support of a sentence less than death. Hannon v. State, 941So.2d 1109, 1168 (Fla. 2096). The letter in question met this threshold and should have been permitted. The Court's admonition in Guzman v. State, 644 So.2d 996, 1000 (Fla. 1994) is pertinent here:

> We are ... concerned about Guzman's contentions that the trial judge erroneously limited the testimony of two of Guzman's witnesses and refused to allow Guzman to recall one of those witnesses. We emphasize that trial judges should be extremely cautious when denying defendants the opportunity to present testimony or evidence on their behalf, especially where a defendant is on trial for his or her life.
>
> Guzman, 644 So.2d at 1000 (Fla. 1994).

Relevant to the issues of ineffectiveness and prejudice are the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases. Among them is Guideline 10.8 - The Duty to Assert Legal Claims which reads, in part:

A. Counsel at every stage of the case, exercising professional judgment in accordance with these Guidelines, should:

1. consider all legal claims potentially available; and

2. thoroughly investigate the basis for each potential claim before reaching a conclusion as to whether it should be asserted; and

3. evaluate each potential claim in light of:

a. the unique characteristics of death penalty law and practice; and

b. the near certainty that all available avenues of post-conviction relief will be pursued in the event of conviction and imposition of a death sentence; and

c. the importance of protecting the client's rights against later contentions by the government that the claim has been waived, defaulted, not exhausted, or otherwise forfeited; and

d. any other professionally appropriate costs and benefits to the assertion of the claim.

B. Counsel who decide to assert a particular legal claim should:

1. present the claim as forcefully as possible, tailoring the presentation to the particular facts and circumstances in the client's case and the applicable law in the particular jurisdiction; and

2. ensure that a full record is made of all legal proceedings in connection with the claim.

> ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases; Revised Edition; February 2003; HOFSTRA LAW REVIEW [Vol. 31:913; 2003]; pp. 1028-29.

This Court recognizes the importance of remorse as a non-statutory mitigator and stated the following in Ault v. State:

> As an additional nonstatutory mitigator, Ault proposed that the court consider the fact that he was remorseful about his criminal conduct in this case and the prior criminal acts he committed. The trial court, rejecting this mitigation, stated only that it found no credible evidence to support Ault's claim. Again, the trial court failed to conduct the proper analysis on this issue. A defendant's remorse can certainly be mitigating in nature, and remorse has frequently been considered as nonstatutory mitigation. See, e.g., Smith v. State, 28 So.3d 838, 853 (Fla. 2009), petition for *cert.* filed, No. 09-10755 (U.S. May 10, 2010); Hernandez v. State, 4 So.3d 642, 655 n.9 (Fla.), cert. denied, 130 S.Ct. 160, 175 L.Ed.2d 101 (2009); Hojan v. State, 3 So.3d 1204, 1218 n.5 (Fla.), cert. denied, 130 S.Ct. 741, 175 L.Ed.2d 521 (2009); Rodgers v. State, 3 So.3d 1127, 1131 (Fla. 2009); see also Smalley v. State, 546 So.2d 720, 723 (Fla. 1989) (reducing death sentence to life in prison where, among other factors, the record indicated that defendant felt genuine remorse). If the trial court had determined that this proposed circumstance was proven by the greater weight of the evidence, it was required to weigh the factor as mitigation unless it could cite competent, substantial evidence supporting its rejection.
>
> Ault v. State, 53 So.3d 175, 192-193 (Fla. 2010)(citations in original).

Again, the jury never got the opportunity to hear what Mr. Baker specially wrote for this purpose of explaining his remorse. The trial court's ruling violated appellant's Eighth Amendment right under the United States Constitution. Cornelius Baker was on trial for his life. The trial judge unduly restricted his

ability to mount a complete defense by his ruling excluding the reading of letter of apology. Further, counsel was ineffective and prejudiced his client's case by his failure to proffer the letter of apology and make it a part of the record of the trial. As a result, Mr. Baker is entitled to a new trial. Eddings v. Oklahoma, 455 U.S. 104 (1984); Strickland v. Washington, 466 U.S. 668 (1984).

ISSUE 2

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 EQUAL PROTECTION PRINCIPLES, THE FIRST, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION AND DENIES MR. BAKER ADEQUATE ASSISTANCE OF COUNSEL IN PURSUING HIS POSTCONVICTION REMEDIES.

The postconviction court denied this claim in its entirety by ruling as follows:

> Claim II alleges that Rule Regulating the Florida Bar 4-3.S(d)(4), which prohibits party attorneys from interviewing jurors, violates the Defendant's constitutional right to equal protection; that Defendant's counsel is treated differently from academics, journalists, other nonlawyers and lawyers not associated with the case. While being somewhat sympathetic to that argument 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); see also 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.
>
> PCR V3 571-572.

In rejecting the claim, the court below failed to address or discuss why academics, journalists and those lawyers not connected with a particular case may interview capital jurors while trial and postconviction defense counsel may not do so. The court below solely relied on case authority from this Court.

However, none of this Court's rulings have addressed why academics may conduct "fishing expeditions" with former capital trial jurors. An example presented was the 1,198 interviews with jurors from 353 capital trials in 14 states, including Florida (as of August 15, 2005) performed by the Capital Jury Project and used in criminal justice doctorate dissertations. See http://www.cjp.neu.edu which lists Julie Goetz, "The Decision-Making of Capital Jurors in Florida: The Role of Extralegal Factors" (unpublished dissertation (1995), School of Criminology and Criminal Justice, Florida State University, Tallahassee, Florida) as a representative dissertation.

None of this Court's rulings have addressed why journalists may conduct "fishing expeditions" with former capital trial jurors without restrictions. The court below was aware that a juror in a Sarasota death penalty case was

interviewed about the experience of sitting through a death penalty trial. "Many Jurors Scarred by Trials;" Sarasota Herald-Tribune, December 4, 2005 (http://www.heraldtribune.com/apps/pbcs.dll/article?AID=/20051204). See also, e.g., Chris Tisch, "Defense Fears Comments Affect Verdict;" St. Petersburg Times, October 25, 2004 (available at http://www.sptimes .com/advancedsearch .html), where the jury foreman of a murder trial is interviewed about the jury's deliberations.

Lastly, none of the cases in this Court's rulings have addressed why lawyers not connected with a case may conduct "fishing expeditions" with former capital trial jurors without restrictions. The level and types of juror misconduct in all types of trials have been outlined by Florida judges concerned with its rise. See, e.g., Artigliere, Barton and Hahn, "Reining in Juror Misconduct: Practical Suggestions for Judges and Lawyers," Fla.BarJ. Vol. 84, No. 1 (January, 2010)("To say that current jurors have enhanced temptation and ability to communicate about the trial with the outside world is the understatement of this still young century. ... [c]ourtroom misconduct seems to be everywhere.").

Because post-trial questioning of jurors can and does come from academic researchers, journalists and lawyers and others not connected with the case, the Florida rules infringe upon the appellant's rights to due process, access to the

courts, and the equal protection concepts enunciated in such cases as Bush v. Gore, 531 U.S. 98 (2000). Criminal defense counsel in Florida are treated differently, unfairly and unequally compared to academics, journalists, and those lawyers and others not connected with a particular case. Consequently, the reliability and integrity of appellant's capital sentence is thereby flawed.

ISSUE 3

FLORIDA STATUTE 921.141 IS FACIALLY VAGUE AND OVERBROAD IN VIOLATION OF THE 8TH AND 14TH AMENDMENTS, AND THE UNCONSTITUTIONALITY WAS NOT CURED BECAUSE THE JURY DID NOT RECEIVE ADEQUATE GUIDANCE IN VIOLATION OF THE 8TH AND 14TH AMENDMENTS. THE TRIAL COURT'S INSTRUCTIONS TO THE JURY UNCONSTITUTIONALLY DILUTED ITS SENSE OF RESPONSIBILITY IN DETERMINING THE PROPER SENTENCE. MR. Baker'S DEATH SENTENCE IS PREMISED ON FUNDAMENTAL ERROR WHICH MUST BE CORRECTED. TO THE EXTENT TRIAL COUNSEL FAILED TO LITIGATE THESE ISSUES, TRIAL COUNSEL WAS INEFFECTIVE.

This claim is presented to preserve it for federal review and is evidenced by the following.

Mr. Baker's jury was unconstitutionally instructed by the Court that its role was merely "advisory." Because great weight is given the jury's recommendation, the jury is a sentencer in Florida. The jury's sense of responsibility was diminished in this case by the misleading comments and instructions regarding the

jury's role. This diminution of the jury's sense of responsibility violated the Eighth Amendment. See Caldwell v. Mississippi, 472 U.S. 320 (1985).

ISSUE 4

THE FLORIDA DEATH SENTENCING STATUTE AS APPLIED IS UNCONSTITUTIONAL UNDER THE 6TH, 8TH, AND 14TH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

This claim is raised to preserve it for federal review.

> In addition to Florida's outlier status as the only state in the country that allows the death penalty to be imposed without a unanimous jury finding of an aggravating circumstance, Florida is also one of the only states to permit the jury to recommend death by less than [a] unanimous vote.
>
> Hurst v. State, — So.3d —, 2014 Fla. LEXIS 1461, *46, fn 8 (May 1, 2014) (Pariente, J., concurring in part and dissenting in part).

Mr. Baker also refers to relevant dicta in State v. Steele, 921 So.2d 538, (Fla. 2005):

> In Ring [v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002)], the Supreme Court held that in capital sentencing schemes where aggravating factors "operate as 'the functional equivalent of an element of a greater offense,' the Sixth Amendment requires that they be found by a jury." Id. at 609, 122 S.Ct. 2428 (quoting Apprendi v. New Jersey, 530 U.S. 466, 494 n. 19, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)). The effect of that decision on Florida's capital sentencing scheme remains unclear. ... Since Ring, this Court has not yet forged a majority view about whether Ring applies in Florida; and if it does, what changes to Florida's sentencing scheme it requires. See, e.g., Windom v. State, 886 So.2d 915, 936-38 (Fla.2004)

> (Cantero, J., specially concurring) (explaining the post- Ring jurisprudence of the Court and the lack of consensus about whether Ring applies in Florida). Cf. Johnson v. State, 904 So.2d 400 (Fla.2005) (holding that Ring does not apply retroactively in Florida). That uncertainty has left trial judges groping for answers. ... The bottom line is that Florida is now the only state in the country that allows the death penalty to be imposed even though the penalty-phase jury may determine by a mere majority vote both whether aggravators exist and whether to recommend the death penalty. Assuming that our system continues to withstand constitutional scrutiny, we ask the Legislature to revisit it to decide whether it wants Florida to remain the outlier state.

Steele, 921 So.2d at 540 and 550 (Fla. 2005).

Mr. Baker acknowledges that this Court holds that Florida's death penalty was not affected by Apprendi v. New Jersey, 530 U.S. 466 (2000). See, e.g., Mills v. Moore, 786 So.2d 532 (Fla. 2001); Schriro v. Summerlin, 542 U.S. 348 (2004); Johnson v. State, 904 So.2d 400, 412 (Fla. 2005); Lebron v. State, 982 So.2d 649 (Fla. 2008); and Hurst v. State, — So.3d —, 2014 Fla. LEXIS 1461 (May 1, 2014).

Mr. Baker is compelled to maintain that the Florida death penalty scheme is unconstitutional as applied in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and Florida law. In 1999, the United States Supreme Court held that "under the Due Process Clause of the Fifth Amendment and the notice and jury 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." Jones v. United States, 526 U.S. 227, 243, n.6 (1999). The Court held that the Fourteenth Amendment affords citizens the same protections under state law. Apprendi v. New Jersey, 120 S.Ct. 2348, 2355 (2000).

In Apprendi, the issue was whether a New Jersey hate crime sentencing enhancement beyond the statutory maximum was an element of an offense requiring a jury determination beyond a reasonable doubt. Apprendi, 120 S.Ct. at 2365. "[T]he relevant inquiry here is not one of form, but of effect -- does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" Apprendi, 120 S.Ct. at 2365. Applying this test, the aggravators under the Florida death penalty sentencing scheme are elements of the offense which must be noticed, submitted to a jury, and proven beyond a reasonable doubt. The state was obligated to prove at least one aggravating factor in the separate penalty phase proceeding before Mr. Baker was eligible for the death penalty. Fla. Stat. § 775.082 (1995).

The aggravating circumstances of § 921.414(6), Fla. Stat., actually define those crimes -- when read in conjunction with §§ 782.04(1) and 794.01(1), Fla. Stat. -- to which the death penalty is applicable in the absence of mitigating

circumstances. State v. Dixon, 283 So.2d 1, 9 (Fla. 1973); §§ 775.082 and 921.141 (2)(a), (3)(a) Fla. Stat. (1995).

Florida capital defendants are not eligible for the death sentence simply upon conviction of first-degree murder. If the court sentenced Mr. Baker immediately after conviction, the court could only have imposed a life sentence. § 775.082 Fla. Stat. (1995). Dixon, 283 So.2d at 9.

Mr. Baker's indictment violated the Sixth and Fourteenth Amendments because it failed to charge the aggravating circumstances as elements of the offense for which the death penalty was a possible punishment. Under the principles of common law, aggravators must be noticed.

> Where a statute annexes a higher degree of punishment to a common-law felony, if committed under particular circumstances, an indictment for the offence, in order to bring the defendant within that higher degree of punishment, must expressly charge it to have been committed under those circumstances, and must state the circumstances with certainty and precision.

Apprendi, 120 S.Ct. 2348, 2355 (2000) quoting Archbold, Pleading and Evidence in Criminal Cases, at 51.

A new penalty phase is required because it is impossible to know whether the jurors unanimously found any one aggravating circumstance in support of the recommendation of death.

ISSUE 5

FLORIDA'S CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED FOR FAILING TO PREVENT THE ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY AND FOR VIOLATING THE GUARANTEE AGAINST CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND TO THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION. TO THE EXTENT THIS CLAIM WAS NOT PROPERLY LITIGATED AT TRIAL OR ON APPEAL, MR. BAKER RECEIVED PREJUDICIALLY INEFFECTIVE ASSISTANCE OF COUNSEL.

This claim is raised to preserve the claim for federal review and is evidenced by the following.

Florida's capital sentencing scheme denies Mr. Baker his right to due process of law, and constitutes cruel and unusual punishment on its face and as applied. Florida's death penalty statute is constitutional only to the extent that it prevents the arbitrary imposition of the death penalty and narrows application of the penalty to the worst offenders. See Profitt v. Florida, 428 U.S. 242 (1976). Florida's death penalty statute, however, fails to meet these constitutional guarantees, and therefore violates the Eighth Amendment to the United States Constitution.

In particular:

1. Execution by both electrocution and lethal injection impose unnecessary physical and psychological torture without commensurate justification, and therefore constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution.

2. Florida's death penalty statute fails to provide any standard of proof for determining that aggravating circumstances "outweigh" the mitigating factors and does not define "sufficient aggravating circumstances."

3. Further, the statute does not sufficiently define for the judge's consideration each of the aggravating circumstances listed in the statute.

4. Florida's capital sentencing procedure does not utilize the independent reweighing of aggravating and mitigating circumstances envisioned in Profitt v. Florida, 428 U.S. 242 (1976).

5. The aggravating circumstances in the Florida capital sentencing statute have been applied in a vague and inconsistent manner. See Godfrey v. Georgia; Espinosa v. Florida, 112 S. Ct. 2926 (1992).

6. Florida law creates a presumption of death where but a single aggravating circumstance applies. This creates a presumption of death in every felony murder case, and in almost every premeditated murder case. Once one of these aggravating factors is present, Florida law provides that death is presumed to be the appropriate punishment, and can only be overcome by mitigating evidence so strong as to outweigh the aggravating factors.

7. The systematic presumption of death is fatally offensive to the Eighth Amendment's requirement that the death penalty be applied only to the worst offenders.

To the extent trial counsel failed to properly preserve these issues, defense counsel rendered prejudicially deficient assistance. See Murphy v. Puckett, 893

F.2d 94 (5th Cir. 1990). Because of the arbitrary and capricious application of the death penalty under the current statutory scheme, the Florida death penalty statute as it exists and as it was applied in this case is unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution and under Article 1 Section 17 of the Constitution of the State of Florida. Its application in Mr. Baker's case entitles him to relief.

ISSUE 6

CUMULATIVELY, THE COMBINATION OF PROCEDURAL AND SUBSTANTIVE ERRORS DEPRIVED MR. Baker OF A FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

The number and types of errors in Mr. Baker's guilt and penalty phases, when considered as a whole, virtually dictated the sentence of death. Mr. Baker's trial counsel failed to proffer the contents of Mr. Baker's statement of remorse and failed to make certain a copy of the remorse letter appeared in the record. This resulted in the Court denying a direct appeal claim as unpreserved. Baker, 71 So.3d 802, 816 (Fla. 2011). Appellate counsel failed to ensure that this Court had the complete record of the trial for the direct appeal. Some 495 pages of the defense's composite exhibits of mitigation and mental health records were finally

placed in the record after the postconviction court's January 11, 2013, Order to Correct the Record of the Direct Appeal. PCR V1 146-149. The postconviction court's Order Denying Motion for Postconviction Relief incorrectly states that the sentencing court found no statutory mitigating factors (PCR 3 570). This is in contrast to this Court's proper and correct analysis and summation regarding the mental disturbance and age statutory mitigators. Baker, 71 So.3d at 814 and 825("Specifically, the trial court found two statutory mitigators (he was young in age, and at the time of the offense, he was suffering from an extreme mental or emotional disturbance.")(Pariente, J., concurring in part and dissenting in part).

While there are means for addressing each error individually, addressing these errors in isolation will not necessarily afford adequate safeguards required by the Constitution against an improperly imposed death sentence. Repeated instances of ineffective assistance of counsel and an unconstitutional process significantly tainted Mr. Baker's capital proceedings. These errors cannot be harmless, especially in a case where the jury vote was 9 to 3 for death and two dissenters as to the legality of Mr. Baker's death sentence. Baker, 71 So.3d at 825. Under Florida case law, the cumulative effect of these errors denied Mr. Baker his fundamental rights under the Constitution of the United States and the Florida Constitution. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986); Ray v. State, 403

So.2d 956 (Fla. 1981); Taylor v. State, 640 So.2d 1127 (Fla. 1st DCA 1994); Stewart v. State, 622 So.2d 51 (Fla. 5th DCA 1993); Landry v. State, 620 So.2d 1099 (Fla. 4th DCA 1993).

CONCLUSION

The numerous constitutional violations which occurred in this case, individually and in concert, justify a remand to the trial court for a new trial or penalty phase.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by electronic mail to James D. Riecks, Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Boulevard, 5th Floor, Daytona Beach, FL 32118 at james.riecks@myfloridalegal.com and CapApp@myfloridalegal.com; and by U.S. Mail to Cornelius O. Baker DOC # 899500, Union Correctional Institution, 7819 NW 228th Street, Raiford, Florida 32026 on this 2nd day of May, 2014.

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I HEREBY CERTIFY, pursuant to Fla.R.App.P. 9.210, that the foregoing was generated in Times New Roman 14-point font.

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