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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC14-873

CORNELIUS O. BAKER,

Petitioner,

v.

MICHAEL D. CREWS, ETC.,

Respondents.

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

COME NOW the Respondents, by and through counsel, and respond as follows to Cornelius O. Baker's (hereinafter "Baker" or "Petitioner") Petition for Writ of Habeas Corpus (hereinafter "Petition") which was filed on May 2, 2014. For the reasons set out below, Respondents respectfully request this Honorable Court to deny the Petition.

RESPONSE TO PRELIMINARY STATEMENT

The "Preliminary Statement" found on page 1 of the Petition correctly recites Article 1, Section 13 of the Florida Constitution. The citation form used in the Petition appears to be accurately described. The remainder of the "Preliminary Statement" is argumentative and is denied.

REQUEST FOR ORAL ARGUMENT

The Respondents defer to this Court's judgment as to whether oral argument is necessary or justified in this case.

RESPONSE TO PROCEDURAL HISTORY

Respondents rely on the following factual and procedural history of this case.

Baker was convicted and sentenced to death for the January 7, 2007 murder of Elizabeth Uptagrafft and this Court affirmed his 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). Baker filed a Motion for Postconviction Relief pursuant to *Florida Rule of Criminal Procedure* 3.851 on February 22, 2013. Following an evidentiary hearing held on September 16, 2013, the Flagler County Circuit Court denied Baker's motion for postconviction relief on October 14, 2013. This Petition and Baker's appeal of the postconviction court's denial of his motion for postconviction relief followed.

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

Baker filed a Motion for Postconviction Relief (hereinafter "Motion") after this Court affirmed his death sentence on direct appeal. Of the six (6) claims Baker raised in his Motion, the parties agreed Baker's claim of ineffective assistance of counsel for trial counsel's failure to proffer Baker's apology letter was the only claim that required an evidentiary hearing. (PC-R. Vol. 10 p.566). At the evidentiary hearing, Baker 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. (PC-R. Vol. 11, p.575).[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 *Id*. at 576.

When asked for his synopsis of his examination of Baker during the penalty phase and Baker'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 that he had expressed to myself and my co-counsel and my investigator the whole time we'd been working on the case. . . 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.

Id. at 580-582.

[1] Citations to the record shall be as follows: The record on appeal concerning the original trial court proceedings shall be referred to as "R. __" followed by the appropriate volume and page number(s). The postconviction record on appeal will be referred to as "PC-R. __" followed by the appropriate volume and page number(s). All other references will be self-explanatory or otherwise explained herein.

Phillips stated he was surprised when Baker pulled the letter out of his coat pocket because on the night before Baker testified at the penalty phase, Phillips and Baker had discussed how Baker should convey his remorse. *Id*. at 583-584.

When asked about his recollection as to what happened to the letter after Baker 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.

Id. at 584-585.

Postconviction Court Order

On October 14, 2013 the postconviction court issued an Order Denying Motion for Postconviction Relief (PC-R. Vol. 3 p. 570-574) (hereinafter "Order"). The Order first addressed Claims II – V of Baker's Motion 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 Baker's right to equal protection. (PC-R. Vol. 1 p. 167). Upon consideration of the merits of Claim II, the postconviction 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)." (PC-R. Vol. 3 p. 571). The postconviction court also cited to Fla. R. Crim. P. 3.575 which sets forth a procedure whereby a party may move the trial court for permission to interview a juror under limited circumstances. *Id*. at 572.

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. (PC-R. Vol. 1 p. 172). Citing *Barwick v. State*, 88 So. 3d 85, 108-109 (Fla. 2011), the postconviction court denied this claim noting 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." (PC-R. Vol. 3 p. 572). The postconviction court also found that trial counsel was "not ineffective for failure to raise a nonmeritorious claim." *Id*. (citation omitted).

Claim IV challenged the constitutionality of the Florida capital sentencing statute based on the U.S. Supreme Court decisions in *Apprendi v. New Jersey,* 530 U.S. 466 (2000) and *Ring v. Arizona, 536 U.S. 584 (2002)*. (PC-R. Vol. 1 pp. 173-174). The postconviction court denied this claim noting that the Florida Supreme 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. (PC-R. Vol. 3 p. 572). The postconviction court also denied Baker'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 Baker had "raised this issue on direct appeal where it was rejected. *Baker v. State*, 71 So.3d at 823-824." *Id*. The postconviction 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. (PC-R. Vol. 1 p. 177). Baker additionally claimed counsel was ineffective for failing to litigate these claims. *Id*. The postconviction 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.

(PC-R. Vol. 3 pp. 572-573). Claim I of Baker's Motion alleged that his trial counsel provided ineffective assistance by failing to proffer Baker's apology letter after it was ruled irrelevant by the trial court. (PC-R. Vol. 1 p. 159). The postconviction court considered Phillips' testimony regarding his strategy for the presentation of Baker's remorse and the circumstances surrounding Baker'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." (PC-R. Vol. 3 p. 573). The postconviction 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).

Id.

RESPONSE TO STATEMENT OF JURISDICTION

The jurisdictional statement found on pages 5-6 of the Petition accurately sets out the basis for this Court's habeas jurisdiction. To the extent the statement of jurisdiction includes an averment of constitutional error, such is denied.

RESPONSE TO GROUNDS FOR RELIEF

CLAIM I

APPELLATE COUNSEL DID NOT COMMIT SERIOUS ERROR BY FAILING TO SUPPLEMENT THE RECORD ON APPEAL IN LIGHT OF THE CUMULATIVE NATURE OF THE COMPOSITE EXHIBIT OMITTED AND BAKER WAS NOT PREJUDICED BY THE OMISSION OF THE COMPOSITE EXHIBIT FROM THE APPELLATE RECORD.

On pages 7-23 of the Petition, Baker claims his appellate counsel was ineffective for failing to supplement the record with Defendant's Composite Exhibit A (hereinafter "Exhibit") which was introduced into evidence but omitted from the record on appeal, thereby depriving this Court of the opportunity to review all of the evidence presented at trial when considering his direct appeal.[2]

[2] Respondents agree that the Exhibit was admitted into evidence, omitted from the record on appeal and contained the following documents:

> Psychological Evaluation by J. Jeff Oatley, Ph.D. dated April 6, 1994; ACT corporation Psychiatric Evaluation by Sharon Winters, M.D. dated April 22, 1994; Psychological Evaluation by James D. Upson,

Baker claims the omission of the Exhibit from the record on appeal renders his death sentence unreliable in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution and the corresponding provisions of the Florida Constitution. *Petition* at 7.

I. Legal Standards

A. Ineffective Assistance of Appellate Counsel.

Generally, in order to be granted habeas relief on the basis of ineffective assistance of appellate counsel, this Court must determine:

> first, whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result.

> Ph.D. dated June 24, 1994; ACT corporation Psychiatric Evaluation by Ann Mian, M.D. dated April 30, 1998; Psychological Report by Peter Larkin, M.A., NCSP dated April 14, 2000; Two (2) reports of Harry Krop, Ph.D. dated July 6, 2007 and September 7, 2007; PET scan dated February 8, 2008 and an MRI dated September 10, 2007; Composite records from Central Florida Eye Institute from 1992-1993; Composite records from Shands Hospital from Mr. Baker's 1992 eye surgery; Composite of Flagler County School health records from Mr. Baker; Composite of Flagler County School system assessment reports for Mr. Baker; and Composite of Flagler County School "other reports" for Mr. Baker.

See Petition at 9-10.

Schoenwetter v. State, 46 So. 3d 535, 563 (Fla. 2010) (*citing Pope v. Wainwright*, 496 So. 2d 798, 800 (Fla. 1986)). "In raising such a claim, '[t]he defendant has the burden of alleging a specific, serious omission or overt act upon which the claim of ineffective assistance of counsel can be based.'" (*Schoenwetter v. State*, 46 So. 3d at 563) (*quoting Freeman v. State*, 761 So. 2d 1055, 1069 (Fla. 2000)).

For grounds argued in more detail *infra*, Respondents contend Baker's appellate counsel did not commit serious error by failing to supplement the record on appeal because the Exhibit was cumulative to the extensive and unimpeached testimonial evidence of Baker's mental health expert. Respondents respectfully contend the absence of the Exhibit from the record on appeal did not undermine confidence in the result reached in Baker's direct appeal in light of the extensive testimony of defense witnesses which established all of the relevant facts and findings contained within the Exhibit. Witness testimony concerning the relevant facts and findings contained in the Exhibit was a part of the record on appeal and the State never impeached any defense witness testimony concerning the Exhibit's content.

B. Incomplete Record on Appeal.

Absent a showing of prejudice, this Court has routinely affirmed death sentences despite there being an incomplete record on appeal. *See Darling v. State*, 808 So. 2d 145, 163 (Fla. 2002) ("Darling has failed to demonstrate what

specific prejudice, if any, has been incurred because of the missing transcripts. The missing portion of the transcript has not been shown to be necessary for a complete review of this appeal."); *Armstrong v. State*, 862 So. 2d 705, 721 (Fla. 2003) ("Armstrong has failed to link a meritorious appellate issue to the allegedly missing record and thus cannot establish that he was prejudiced by its absence."); *Thompson v. State*, 759 So. 2d 650, 660 (Fla. 2000) (We have previously rejected a similar claim that appellate counsel was ineffective for failing to have transcribed portions of the record, including parts of voir dire, the charge conference, and a discussion of whether the defendant would testify. *See Ferguson v. Singletary*, 632 So. 2d 53, 58 (Fla. 1993)).

Baker claims he was prejudiced because the missing exhibits prevented this Court from "being able to adequately review the trial court's determination of Mr. Baker's sentence, which further prevented this Court from performing a competent proportionality review." *Petition* at 22-23. However, careful consideration of the record, as it appeared before this Court on Baker's direct appeal, reveals that the Exhibit adds no substantial mitigating evidence to the record whatsoever. Assuming *arguendo* that appellate counsel committed serious error by failing to supplement the record, Baker's request for relief must nevertheless be denied because Baker has failed to sufficiently demonstrate how he was prejudiced by the omissions in the record, *i.e.* Baker has failed to show how consideration of new

information contained within the Exhibit would change the result of Baker's direct appeal or otherwise undermine confidence therein. *See Henry v. State*, 937 So. 2d 563, 577 (Fla. 2006) (without any specificity as to how Henry has been prejudiced by the omissions in the record, denial of this claim is warranted under the applicable law.)

II. The Record on Appeal Contained Extensive Testimonial Evidence Concerning the Relevant Portions of the Missing Exhibits.

The relevant facts and findings contained in the missing exhibits were in fact contained in the record on appeal in the form of extensive witness testimony. Baker claims that his mental health expert, Dr. Krop, "mentioned highlights" from the various psychological evaluations and brain scans contained in the Exhibit. *Petition* at 11. However, this statement significantly minimizes the depth of Dr. Krop's testimony. In fact, Dr. Krop's testimony during the penalty phase provided this Court with extensive detail about Baker's difficult childhood as well as all of the medical, psychological, and educational issues that were documented in the Exhibit. The following is a list of excerpts from Dr. Krop's testimony which explains in detail the dynamics of Baker's difficult childhood as well as his medical and developmental challenges:

> Baker's mother "used alcohol throughout her life but, also, during her pregnancy with Mr. Baker." (R. Vol. 17, p. 60); "The mother and father were absent a lot during the formative years of Mr. Baker." *Id*.; Baker's father was "in and out of prison from the time that Mr. Baker

was about two years old." *Id*.; "One of the reasons why the father was in prison was because he was accused of sexually abusing Mr. Baker's next oldest brother…" *Id*.; One of Baker's sisters "also was sexually abused by the father…" *Id*. at 61; "Throughout the children's development and early childhood, there was considerable domestic violence between the mother and father." *Id*.; "When the father was not in prison he was also drinking and abusing drugs." *Id*.; "Mr. Baker also described being physically abused by the mother in terms of switches, brushes and some other implements." *Id*.; "[W]hen Mr. Baker was five years old, apparently, while throwing rocks, was hit – one of them ricocheted and hit him in the eye. Mr. Baker is blind in one eye. He has had several surgeries subsequent to that incident." *Id*.; "[T]he mother didn't even take him to see a doctor for a few days until after the [eye injury] incident." *Id*.; "This medical issue [eye injury] was compounded by the fact that there was a significant delay, developmental delay of Mr. Baker in terms of his speech. He still presents with a moderate speech impediment, but it was significant, according to the records, when he was younger." *Id*. at 62; "When he entered school, it was noted that he had both a speech problem and, of course, also the vision problem." *Id*.; Baker "remembers being referred to as One-eyed Willie, Midnight, Ugly and even his – according to Mr. Baker – father or other family members teased him about that." *Id*.; Baker "was retained in kindergarten. The records actually suggest that he was retained three times in kindergarten…" *Id*.; "[A]t the age of five, he was taken out of his mother's custody because of her neglect and abuse." *Id*.; "[A]fter the father got out of prison, probably because of the sexual allegations or the sexual offense, he was not permitted to have contact with the children while they were young." *Id*. at 64; When Baker failed kindergarten at age five, school reports "indicated that he had expressive problems, which is [a] language deficit." *Id*.; "[Baker] was placed in special classes pretty much from the onset of his educational career." *Id*. at 65.

The following list of excerpts from Dr. Krop's testimony describes the findings contained in the psychological evaluation conducted by J. Jeff

Oatley, Ph.D. on April 6, 1994, and the ACT corporation psychiatric evaluation conducted by Sharon Winters, M.D. on April 22, 1994:

> "Dr. Oatley evaluated [Baker] and indicated his IQ was 74, which is probably the lower two percent of the overall population." *Id*. at 66-67; It was "hard [for Dr. Oatley] to get a full assessment of [Baker] because he was so hyperactive and had difficulty sitting still." *Id*. at 67; "He was diagnosed as having a developmental articulation disorder, which is basically a speech impediment. He was diagnosed with borderline IQ, and he was diagnosed as having attention deficit hyperactivity disorder." *Id*.; Six days after Dr. Oatley's examination, Dr. Sharon Winters "diagnosed [Baker] as moderate to severe attention deficit hyperactivity disorder." *Id*. at 68; "She described him being unable to stay seated longer than ten seconds at a time." *Id*.; "She placed him on Ritalin for his hyperactivity and placed him on Clonidine to help him sleep…" *Id*.; [Dr. Winters] noted he was "blind in that eye." *Id*. at 69; Due to problems at school, family issues, and his inability to concentrate or sit still, Dr. Winters felt Baker's "psychosocial stressors were pretty serious." *Id*. at 70; Dr. Winters found that Baker had a global assessment of functioning of "[s]ixty-eight" which indicated a "mild to moderate … impairment of overall functioning." *Id*. at 72.

The following list of excerpts from Dr. Krop's testimony summarized and explained the relevant portions of the psychological evaluation by James D. Upson, Ph.D. dated June 24, 1994, and the ACT corporation psychiatric evaluation by Ann Mian, M.D. dated April 30, 1998:

> In June of 1994, Dr. Upson did a psychological evaluation, intellectual testing, and achievement testing and Baker "ended up with an IQ of 86, which was in the lower part of the low average range." *Id*. at 73-74; "But it's interesting, because Dr. Upson still diagnosed him as borderline intellectual functioning, maybe taking into account that the scores probably are higher due to the transfer effect. Dr. Upson also diagnosed him as attention deficit hyperactivity disorder

and having a learning disability in the areas of reading, spelling and arithmetic…" *Id*. at 74; According to a psychiatric assessment by Act in April of 1998, "it was determined that he -- his adaptive functioning [GAF of 45] was quite severe." *Id*. at 76; "[Act] also talked about severe psychosocial stressors, including unstructured, unsupervised activity, lack of effective role models or parent and school failure, problems with his primary support groups." *Id*. at 77; GAF ratings "[b]etween 40 and 50 are serious symptoms or serious impairment in social … or schooling functioning, unable to maintain friends…when it gets below that, like in the 40 or below, we're talking about individuals who are pretty much psychotic and are really seriously psychiatrically ill." *Id*. at 79; Act developed a psychiatric treatment plan, stating problems are "poor attention span and hyperactivity, poor frustration tolerance and impulsivity. "The goal of [Baker's treatment plan was] to control hyperactive behavior, improve tension and impulsivity. The purpose is to minimize school and home behavioral problems." *Id*. at 80; Act recommended "psychiatric evaluations, psychological treatment…individual and family counseling…Boy Scouts, church youth groups or things like that…" and to continue taking "Ritalin and Clonidine, two of the same medications that he was prescribed several years before." *Id*. at 80-81.

Dr. Krop's testimony then addressed the psychological report by Peter Larkin, M.A., NCSP dated April 14, 2000, as follows:

Peter Larkin of the Flagler County school district classified Baker "as a student with a specific learning disability." *Id*. at 81; Achievement testing "showed that [Baker] was in the tenth percentile in math, fifth percentile in reading, ninth percentile in spelling," *Id*. at 81-82; "[P]utting them all together, they showed him to be in the sixth overall percentile in the population, which is the grade equivalent of 3.9 [a]nd he was in grade seven at the time." *Id*. at 82; Larkin's report "showed [Baker] wasn't learning." *Id*.; Larkin's report "discussed how his behavior at home was a clinically-significant concern." *Id*.; Larkin's report indicated "that this may be a long-term problem, and there was some question as far as whether … continued placement and learning disability and intervention is really going to do any good." *Id*.; Larkin's report "did indicate that [Baker] needs consistent

> and effective individualized assistance to evaluate his behavior and discover some alternative to class disruption, rudeness and so forth." *Id*.

Dr. Krop then summarized the findings contained in his two (2) reports dated July 6, 2007, and September 7, 2007, as follows:

> "I made a referral to Dr. Tanner…based on my initial psychological and neuropsychological testing." *Id*. at 83; Baker "came out with an IQ of 81." *Id*.; "[An IQ of 81] would be somewhere in the maybe seventh or eighth percentile of the population." *Id*. at 84; "That would come out to a mental age of about 14 or 15. And, basically, that would be his mental age for the rest of his life." *Id*.; "In the original testing that I did, [Baker] did fairly well on most of the tests, with the exception of those tests that I gave to measure frontal lobe, the executive functions."; *Id*. at 87; "Adults with frontal lobe deficits…can't problem solve…[t]heir judgment is poor." *Id*. at 88; "Sometimes when they start something, they have difficulty pulling it back. Sometimes, actually, they have problems starting." *Id*.; "[B]ecause…the executive function test were the only areas that showed deficiency, I went back and did additional testing, a battery of tests called the Delis-Kaplan Executive Function System." *Id*.; "[T]he results showed the same as the original frontal lobe tests, that [Baker] did have deficits suggesting that there were some executive function problems." *Id*. at 89; "It was at that point that I felt a need to refer him to a neurologist…to see whether there, in fact, may be some organic problem." *Id*.

After explaining the fundamentals of MRI and PET scans, Dr. Krop then explained the results of Baker's PET scan dated February 8, 2008, and Baker's MRI dated September 10, 2007, as follows:

> The MRI did not show any abnormal findings, but the PET scan showed that there was a decreased uptake within the bilateral posterior parietal, bilateral temporal and bilateral frontal regions. Basically what that's saying is that their PET scan on him were abnormal -- was

> abnormal. And it reflected mostly in the frontal areas of the brain, which would be very consistent with my neuropsychological testing.

Id. at 91.

Dr. Krop's testimony on direct examination concluded with the following opinions and diagnoses:

> "[M]y working diagnosis currently would be attention deficit hyperactivity by history, but currently, I would only diagnose him with having attention deficit disorder." *Id.* at 96; "I think [Baker's issue with] impulse control is, in part, due to the attention deficit hyperactivity disorder." *Id.*; "[M]y second diagnosis is what's referred to as cognitive disorder not otherwise specified, which means that the results of testing suggest strongly that there is a neuropsychological or neurological component to the difficulties he has had." *Id*. at 97; "[I]t's my opinion that he has this cognitive disorder resultant to the most likely frontal lobe part of the brain impairment, which is always going to be there. That's not fixable." *Id*.; The third diagnosis is polysubstance abuse." *Id*.; "He has been a persistent and consistent user of marijuana. And he also started drinking at an early age, but started drinking heavily at the age of 16." *Id.*; "[H]e will always carry a diagnosis of antisocial personality disorder, which is basically personality deficits which contribute to a person with – continuing to engage in behaviors which are illegal." *Id*. at 98; "Cornelius Baker started engaging in [criminal] activity around the same age that his brother did, which was around the age of ten or eleven." *Id.* at 99; "One of the things I also alluded to, and I think it's pretty obvious, is, we have a kid with a very bad self-concept." *Id*. at 99-100; "[W]e have a kid, pretty much, that also didn't have much of a chance to be very successful or adaptive in life." *Id*. at 100; "It's my opinion that Mr. Baker suffers with a serious emotional disturbance. I didn't even get into the fact that he was a bed wetter when he was younger, up to the age of 11 or 12." *Id*. at 101.

III. Dr. Krop's Testimony Concerning the Information Contained in the Exhibit were Unimpeached and Therefore Did Not Need Documentary Support.

The State's cross examination of Dr. Krop was relatively brief.[3] The State first questioned Dr. Krop about his experience serving, primarily, as an expert witness for the defense (R. Vol. 17, p.106-107). The State then challenged Dr. Krop's opinion that Baker suffered brain damage based upon Baker's negative MRI, but receded from this line of questioning once Dr. Krop explained that he based his opinion on his own neuropsychological testing and the findings of Baker's PET scan. *Id*. at 108-109. The State also questioned Dr. Krop's finding that Baker has low intelligence based on an ACT corporation report of April 2002 which noted Baker had "normal" intelligence and a "strong street sense." *Id*. at 109-110. Dr. Krop explained that said report indicated that "no documentation [was] available at this time," meaning that the three (3) prior low IQ test scores were not available and it was the social worker's opinion based solely on the interview that day which lead to her belief that Baker had normal intelligence. *Id*. at 110-111. The remainder of the State's cross examination, while admittedly

[3] The entire cross examination spans less than seven (7) pages of trial transcript (R. Vol. 17, p. 106-113). By comparison, Dr. Krop's direct examination testimony exceeded fifty (50) pages of trial transcript. *Id*. at 50 – 90, 95 – 104, 113 - 114.

argumentative,[4] did not in fact further challenge any of Dr. Krop's findings or testimony.

During cross examination, the State challenged Dr. Krop's findings of brain damage and borderline intelligence but left the remaining bulk of Dr. Krop's testimony unrefuted. Even more germane to the issue at hand, the State never questioned Dr. Krop about any of his recollections of the contents of the documents contained within the Exhibit, thus his testimony concerning such was completely unrefuted. In contrast to Baker's claim to the contrary,[5] Dr. Krop's conclusions and his testimony concerning the contents of the documents within the Exhibit were unimpeached and therefore did not need documentary support or augmentation.

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[4] The state concluded its cross examination by reviewing world and U.S. population numbers with Dr. Krop and asking Dr. Krop if he agreed with calculations as to the number of people worldwide and nationwide that would have Baker's IQ or lower based on Dr. Krop's finding that Baker's IQ was in the bottom eighth percentile. *Id*. at 111-113. While these questions were seemingly aimed at the prosecution's attempt to make a point about risk factors for homicide, this line of questioning was actually **based on** Dr. Krop's finding that Baker's IQ was in the bottom eighth percentile - it did not challenge such.

[5] *See Petition* at 11. Baker claims "the reports themselves contain additional information that support and augment Dr. Krop's conclusions"

IV. Baker Failed to Demonstrate that he was Prejudiced by the Missing Exhibit.

A. Evidence of Brain Damage.

The abundance of testimonial evidence elicited from defense witnesses during the penalty phase provided this Court with all of the relevant and significant mitigation evidence necessary for it to conduct an appropriate proportionality review, and Baker has failed to demonstrate how this Court's consideration of any new information to the record on appeal undermines confidence in the correctness of the result of Baker's direct appeal. This point is evidenced by the specious nature of Baker's claims in support of his prejudice argument. Baker first claims that "[w]hile Dr. Krop mentioned highlights from the various psychological evaluations and PET scan during his testimony, the reports themselves contain additional information that support and augment Dr. Krop's conclusions."[6] *Petition* at 11. In his Petition, Baker directs this argument toward the following trial court finding[7] with which Baker takes exception:

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[6] Respondents are aware of only one conclusion with which the trial court and Dr. Krop disagreed, *to wit*, Dr. Krop's opinion that Baker suffers from significant brain damage. As argued *supra*, Dr. Krop's remaining conclusions were essentially unrefuted by the State, accepted by the trial court and were accordingly not in need of "support" or "augmentation" during appellate review.

[7] Throughout his Petition Baker identifies trial court rulings with which he finds error or an abuse of discretion. To the extent that any such claims are interpreted

> Dr. Krop reached the opinion that as a result of neuropsychological testing he performed, along with the results of a PET scan that the Defendant suffers from significant brain damage. No other of the numerous reports *even suggested the possibility* of brain damage.

Id. at 11-12 (citing R.566) (emphasis in original).

Baker claims said finding is contradicted by Dr. Upson's June 1994 report which states that Mr. Baker was "screened for 'organic impairment' and was found to have scored four standard deviations below the norm for his age on the Token Test of Children,[8] which showed a significant impairment in the area of receptive

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as a request for relief therefore, said claims are procedurally barred in this habeas corpus proceeding because they were not raised on direct appeal or in a postconviction motion. As this court has previously held in *Schoenwetter v. State*, 46 So. 3d 535, 563 (Fla. 2010):

> Claims of ineffective assistance of appellate counsel may not be used to camouflage issues that should have been presented on direct appeal or in a postconviction motion. *See Rutherford v. Moore*, 774 So. 2d 637, 643 (Fla. 2000). If a legal issue 'would in all probability have been found to be without merit' had counsel raised the issue on direct appeal, the failure of appellate counsel to raise the meritless issue will not render appellate counsel's performance ineffective." (*Id.*) (quoting *Williamson v. Dugger*, 651 So. 2d, 84, 86 (Fla. 1994)).

[8] According to its publisher's website, The Token Test for Children is a ten to fifteen (10 – 15) minute screening measure for assessing receptive language in children ages 3 years 0 month to 12 years 11 months. "[The test] comes with 20 small tokens, varying in size (large and small), shape (round and square), and color (blue, green, yellow, white, and red). The child is given three opportunities to practice. The administrator then gives the child 46 linguistic commands, to which they must respond by manipulating the tokens. The commands are arranged in four

language." *Petition* at 12. (*citing* PC-R Vol. 12-A, p.9). However, a finding of a "significant impairment in the area of receptive language" based on results of the Token Test for Children is simply not a finding of organic brain damage - it is a finding of a learning disability[9] - and said finding adds nothing new to the record in light of Dr. Krop's unrefuted testimony which indicated that "Dr. Upson…diagnosed [Baker] as attention deficit hyperactivity disorder and **having a learning disability in the areas of reading, spelling and arithmetic**…" (R. Vol. 17 at 74) (emphasis added). Baker's score in the Token Test for Children was merely cumulative evidence of Baker's learning disability and Baker's contention

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parts of increasing difficulty, and must be administered in consecutive order." *http://www.proedinc.com/customer/productView.aspx?ID=3992*

[9] Receptive language disorders are categorized as "Learning Disorders" in the Fourth Edition of the Diagnostic and Statistical Manual of Mental Disorders ("DSM-IV"). DSM-IV only identifies "Expressive Language Disorder 315.31" and "Mixed Receptive-Expressive Language Disorder 315.32." DSM-IV describes Mixed Receptive-Expressive Language Disorder as follows:

> An individual with this disorder has the difficulties associated with Expressive Language Disorder (e.g. a markedly limited vocabulary, errors in tense, difficulty recalling words or producing sentences with developmentally appropriate length or complexity, and general difficulty expressing ideas) and also has **impairment of receptive language development (e.g. difficulty understanding words, sentences, or specific types of words).**

DSM-IV at p.62 (emphasis added).

that such could have somehow augmented or supported Dr. Krop's finding of organic brain damage on direct appeal is profoundly misguided.

While Respondents recognize that some hypothetical thought is logically necessary when arguing prejudice from missing records, Baker has taken this concept to new and procedurally inappropriate heights. Baker claims that the trial court's Sentencing Order "give[s] the impression" that only Dr. Krop expressed the opinion that Mr. Baker suffers from brain damage. *Petition* at 12. Baker then suggests that if other evaluators had looked for metabolic signs of brain damage and, if similar tests had been performed, then "the trial court's finding would be more relevant." *Id*. This claim is not only wildly speculative but also completely meritless.

The trial court's sentencing order does far more than "give the impression" that only Dr. Krop opined that Baker suffers from serious brain damage - it conclusively and correctly found such. Contrary to Baker's claim, neither the PET scan nor any other defense exhibit submitted into evidence tendered a conclusion that Baker suffered from brain damage. In support, Baker relies on his PET scan report which states, "Impression: Areas of decreased uptake in the bilateral posterior parietal, temporal and frontal regions which may[10] be consistent with

[10] The word choice, "may", is far from conclusory language.

patient history of dementia." *Petition* at 12-13 (*citing* PC-R Vol. 12-A, p. 52). Baker then attempts to infer a finding of brain damage into said notation by reference to a definition of dementia as "deterioration of intellectual faculties, such as memory, concentration, and judgment, resulting from an organic disease or a disorder of the brain, and often accompanied by emotional disturbance and personality changes. *Id.* at 13 (citation omitted).

Baker's argument attempts to disguise a mental health diagnosis that could theoretically be caused by organic brain damage as a conclusive finding of brain damage.[11] According to Baker's definition, dementia can result "from an organic disease", such as cancer, Alzheimer's, Parkinson's, etc. or, more relevantly to the instant case, from a "*disorder of the brain"* such as Baker's thoroughly documented Attention Deficit Hyperactivity Disorder. Simply stated, according to Baker's definition, dementia is caused by brain diseases or brain disorders, but not necessarily by brain damage. Further, Baker's speculation as to what medical findings may have been reached "if other evaluators had looked for metabolic signs of brain damage and if similar tests had been performed," while a question that could theoretically be relevant to an inquiry pertaining to the effectiveness of

[11] Interestingly, while one would assume dementia could be caused by organic brain damage, such as damage caused by head trauma, prolonged oxygen deprivation, etc., Baker's own definition for dementia does not seem to indicate such.

Baker's trial counsel raised appropriately in a postconviction motion, should be disregarded by this Court in this habeas corpus proceeding because such is not only wildly speculative, but also wholly irrelevant to the question presented in the instant case, *to wit*, the effectiveness of Baker's appellate counsel. *See Schoenwetter v. State*, 46 So. 3d 535, 563 (Fla. 2010) (Claims of ineffective assistance of appellate counsel may not be used to camouflage issues that should have been presented on direct appeal or in a postconviction motion) (*citing Rutherford v. Moore*, 774 So. 2d 637, 643 (Fla. 2000)).

B. Evidence of Poor Insight and Limited Intellectual Functioning and Knowledge.

Baker's Petition also takes exception with the trial court for "focus[ing] on some notations in the psychological and psychiatric reports, while omitting other observations." *Petition* at 14. Baker claims "[t]he trial court correctly noted that most evaluations found impulsive behavior; however Dr. Mian's 1998 psychiatric evaluation also found poor insight into problems and limited intellectual functioning and knowledge." *Id.* (*citing* PC-R Vol. 12-A pg. 12). Baker cites this as "an example of information that did not come out through the testimony of Dr. Krop…" *Id*. The fact that Baker points to evidence of Baker's "poor insight into problems" and "limited intellectual functioning and knowledge" as being new evidence to the record on appeal which was not previously considered by this

Court on direct appeal demonstrates the hollowness of his request for relief altogether.

The record on appeal was replete with testimony concerning Baker's poor insight into problems and his limited intellectual functioning and knowledge. As previously cited in pages 23-36 *supra*, Dr. Krop testified that Baker: 1) had an inability to concentrate and could not sit still for more than ten seconds at a time; 2) had borderline intelligence; 3) had learning disabilities; 4) exhibited poor behavior in school, including class disruptions, fights and rudeness; 5) wasn't learning; 6) had a GAF of 45 which was described as being a serious impairment of social and school functioning; 7) had a frontal lobe deficit and adults with frontal lobe deficits **can't problem solve** and their **judgment is poor**; and 8) had and will maintain a mental age of 14-15 as an adult. (emphasis added).

Baker's inability to concentrate due to ADHD, his poor behavior in school such as class disruptions, rudeness, and fights, and his **inability to problem solve** due to a frontal lobe deficit may not have been worded as 'poor insight into problems" but these factors clearly connote poor insight into problems. Baker's claim that this factor was missing from the original record on appeal is clearly erroneous. Further, this Court's consideration on direct appeal of Baker's borderline IQ, his multiple learning disabilities, and his serious impairment of school functioning related to his GAF score of 45 could not logically be affected

by Baker's proposed subsequent consideration of an additional finding that Baker had "limited intellectual functioning and knowledge." This inescapable logic equally applies to Baker's claim of prejudice based upon the fact that Dr. Winters' findings of "low average intelligence" and "impaired insight" were not technically mentioned during Dr. Krop's testimony or otherwise reflected in the original record on appeal. *See Petition* at 15.

C. Specific Acts Supporting Diagnoses and Explanations of Diagnoses.

Baker next claims the Exhibit could have changed the results if this Court's proportionality review by providing specific examples of behavior which led to Baker's diagnoses. *Petition* at 14. Within this argument, Baker characterizes his diagnoses as the "assignment of labels" and erroneously claims that said "labels" were "all that was included in Dr. Krop's testimony." *Petition* at 14-15. In support, Baker points to descriptions of him which he claims were not reflected in the original record on appeal such as: difficulty focusing; being fidgety; falling out of his chair; throwing play dough rather than following instructions during an evaluation; being easily frustrated; having poor concentration; and overactivity. *Petition* at 15. However, Dr. Krop's testimony did in fact provide this Court with far more than just Baker's diagnostic "labels". In fact, Dr. Krop's testimony explained each of Baker's diagnoses and cited to examples of behavior that supported them.

Regarding the difficulties evaluators had in assessing Baker when he was young, Dr. Krop testified that "it was hard to get a full assessment of him **because he was so hyperactive and had difficulty sitting still.**" (R. Vol. 17, p. 67) (emphasis added). Dr. Krop explained that Dr. Winters "described him being **unable to stay seated longer than ten seconds**." *Id*. at 68 (emphasis added). When discussing the ACT corporation treatment plan dated April of 1998, Dr. Krop responded as follows when asked to describe Baker's problems, symptoms and behaviors, "Well, they say, **poor attention span** and **hyperactivity, poor frustration tolerance** and impulsivity." *Id*. at 80 (emphasis added). Though not word for word, this unrefuted testimony clearly contradicts Baker's claim that the record on appeal did not reflect Baker as "having poor concentration," "overactivity," and "being easily frustrated." See *Petition* at 15.

Furthermore, Baker's claim that "diagnostic labels" were all that was included in Dr. Krop's testimony is untenable in light of the following testimony:

> DR. KROP: . . . my working diagnosis currently would be attention deficit hyperactivity disorder by history, but currently, I would only diagnose him with having attention deficit disorder. So the attentional problem is still there, the receptive problem, but … he may not be as hyper.
>
> MR. PHILLIPS: Would the impulse control problems still be present?

> DR. KROP: Sure. I think the impulse control is, in part, due to the attention deficit hyperactivity disorder. And, unfortunately, we don't know what really causes ADD or ADHD.
>
> In his case, and this answers you question but is also a secondary diagnoses, based on my neuropsychological testing, my second diagnosis is what's referred to as a cognitive disorder not otherwise specified, which means that the results of testing suggest strongly that there is a neuropsychological or neurological component to the difficulties he has had…
>
> [I]t's my opinion that he has this cognitive disorder resultant to the most likely frontal lobe part of the brain impairment, which is always going to be there. That's not fixable. So when you ask the question, is his impulse control problem still there, yes.
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> The third diagnosis… is polysubstance abuse.
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> …Mr. Baker began using marijuana at 12. He has been a persistent and a consistent user of marijuana. And he also started drinking at an early age, but started drinking heavily at the age of 16.
>
> So the third diagnosis would be the polysubstance abuse, meaning he abuses more than one elicit – well more than one substance.
>
> The forth diagnosis, which, given his history of behavioral difficulties and involvement in the criminal justice system, he will always carry a diagnosis of antisocial personality disorder, which is basically personality deficits which contribute to a person with – continuing to engage in behaviors which are illegal.

R. Vol. 17 at 96-98.

Dr. Krop also pointed to specific behaviors that supported his diagnosis of antisocial personality disorder, noting that due to a lack of supervision, Baker and his older brother began committing burglaries around the age of ten or eleven. *Id.*

at 98-99. Further, Dr. Krop explained Baker's childhood developmental articulation disorder as being "basically a speech impediment," gave detailed explanations as to the meaning of Baker's GAF score of 45, and provided reference for the meaning of Baker's IQ score of 81. (*Id*. at 67, 79, 84). Accordingly, this Court should reject Baker's claim that the record on appeal was devoid of explanations of and specific acts supporting his diagnoses.

D. Baker's Ability to Control Himself and Take Responsibility for his Acts.

Baker claims that his "history shows that he does not have the same ability as a normal person to control himself and to understand the consequences of his actions…" and further claims it was therefore erroneous for the trial court to find that "there was *no evidence* presented that he was unable to take responsibility for his acts and appreciate the consequences of them at the time of the murder.'" *Petition* at 16 (emphasis in original) (citing Vol. 4, p.568). Respondents respectfully contend Baker emphasizes the wrong part of the trial court's finding. While it is true that Baker suffered from **impairment** in his self control, judgment and insight **as a child**, said trial court finding specifically noted a lack of evidence to support a finding that Baker was **unable** to take responsibility for his acts and appreciate the consequences of them **at the time of the murder**. In fact, this finding is supported by an abundance of irrefutable evidence, as was the trial

Court's finding that Baker's emotional disturbances did not "affect his ability to conform his conduct to the requirements of the law", a finding with which Baker also takes exception. *See Petition* at 17 (citing R. Vol. 4, p. 567). Baker's contention of error or abuse of discretion regarding these findings and regarding the trial court's decision to give Baker's emotional disturbance mitigator "little weight"[12] are not only meritless, but also procedurally barred in this habeas corpus proceeding. *See Schoenwetter v. State*, 46 So. 3d 535, 563 (Fla. 2010).

In support of his claim, Baker cites to the school board's decision (as discussed in Peter Larkin's 2000 report) to provide Baker with an individual aide in Baker's self-contained class "due to his **tendency** to go off task, escalate emotion and not care about the consequences of his actions – to himself or others." *See Petition* at 16 (emphasis added). However, this observation is simply not evidence that Baker suffered from a **permanent inability** to control himself or to understand the consequences of his actions. Such is true irrespective of Dr. Krop's finding that Baker's cognitive disorder which causes impairment in impulse control, judgment and problem solving was "always going to be there." *See* (R. Vol. 17, p. 97). The impairment in judgment and insight suffered by Baker, be it temporary or permanent, did not equate to a complete inability to conform his

[12] *See Petition* at 17.

conduct to the requirements of the law and Baker has cited to no authority or evidence to reasonably support such a proposition. In fact, Dr. Krop opined to the contrary when he testified,

> So we have a vicious cycle, starting actually at birth, when we talk about fetal alcohol, whereas Cornelius was a kid. **I'm not in any way trying, nor was he trying to excuse his behavior for the tragedy that he inflicted,** but we have a kid, pretty much, that also didn't have much of a chance to be very successful or adaptive in life

(R. Vol. 17. at 100) (emphasis added),

and further testified,

> Certainly, I'm not suggesting that he was insane at the time of the offense. **I'm not saying that he didn't know right from wrong.** But to a lesser degree, clearly, this man's emotional disorder had an impact on what happened.

Id. at 101-102 (emphasis added).

Baker himself demonstrated an unmistakable appreciation for the consequences of his actions at the time of the murder when he attempted to avoid apprehension for his crimes by: a) throwing away the gun he used during his crime spree shortly after killing Elizabeth Uptagrafft in the Mondex; b) fleeing and eluding from police in a high speed car chase through a residential area; and c) hiding after being identified and chased by police. Baker's confession and cooperation with law enforcement once apprehended and, most notably, his apology to the victims' family which he provided to a news reporter on the same

day as the murder further supports the trial court's finding that Baker had the ability to understand and take responsibility for the consequences of his actions at the time of the murder. *See* (R. Vol. 20 at 47-48). Accordingly, Baker's claim that there is information contained in the Exhibit which "contradicts the trial court's findings [that Baker was able to take responsibility for his acts and appreciate the consequences of them at the time of the murder,] and therefore calls into question whether the mitigating evidence was properly [weighed]" clearly misses the point of the trial court's findings. *See Petition* at 16.

E. Baker's Polysubstance Abuse, Fetal Alcohol Syndrome and Newly Alleged Alcohol Related Neurological Disorder

Baker next contends the trial court erred in finding that Baker "chose to abuse drugs and alcohol" because the trial court failed "to consider to what extent the years of drug therapy may have caused his system to crave narcotics." *Petition* at 18 (*citing* R.Vol. 4, p. 569). Baker then claims "[a] review of *all the documented evidence* of Mr. Baker's brain damage, low intellectual functioning and substance abuse would lead this Court to find that these mitigators are entitled to more than 'some weight.'"[13] *Id*. However, Baker's petition again misses the

[13] While Baker claims error with the weight the trial court gave to this mitigator (*See Petition* at 18) Baker did not raise this issue on direct appeal and is procedurally barred from claiming trial court error regarding this issue *Schoenwetter v. State*, 46 So. 3d 535, 563 (Fla. 2010).

point of these habeas corpus proceedings. Baker's argument fails to adequately explain how any new information about Baker's drug and alcohol use, which was contained in the Exhibit and therefore missing from the record on appeal, either supports his claim or otherwise undermines confidence in this Court's consideration of Baker's polysubstance abuse when it conducted Baker's proportionality review on direct appeal.

This Court was clearly presented with all of the relevant evidence concerning Baker's childhood use of prescription drugs on direct appeal. Dr. Krop's testimony established that in April of 1994, Dr. Winters placed Baker on Ritalin for his hyperactivity and placed him on Clonidine to help him sleep. (R. Vol. 17, p.68). Dr. Krop further explained these drugs as follows:

> [Ritalin] was a commonly used medication. It's actually a stimulant. But when given to children, it has the opposite effect. It hopefully slows them down, and then it works on their hyperactivity.
>
> And, you know, there's some potential adverse consequences, so it – you know, it's recommended to be used cautiously, typically during times when it's most important for the kid to be able to be less hyper. Some kids are only given Ritalin in the school setting….
>
> [Clonidine]'s a medication, again, to – it's often used actually with individuals with bipolar disorder, but it's used to help sedate, or in this case, it was probably prescribed at night to help him sleep.

Id. at 72-73.

Concerning his review of an Act corporation report dated April of 1999, Krop testified, "It was recommended at that time, and he probably was still getting it, was Ritalin, Clonidine, two of the same medications that he was prescribed several years before." *Id*. at 80-81.

Baker himself also testified about his childhood use of prescription drugs as follows:

> Like my sister said,[14] it seemed like it didn't do nothing for me. It seemed like it just made me worser (sic). I was bad when I was on it and I was bad when I was off it, so it really didn't do nothing for me.

(R. Vol. 18, p. 172-173).

Baker's Petition claims his "system was fed drugs from time he was a child"[15] and points to the more detailed prescription information included in the Exhibit to establish such. However, this new information to the record on appeal actually adds nothing to the consideration of this mitigation evidence because it is

[14] Baker's sister, Felicia Baker, testified that Baker and her other two siblings all took the same kind of medications. Felicia Baker testified, "To me, I didn't think they really needed it. It seemed like, to me, it just made them worse." (R. Vol.17 p. 144)

[15] Baker claims he was "medicated with Ritalin… three (3) times a day, as well as Clonidine, a drug that enabled Mr. Baker to sleep, from the time he was seven (7) years old until he was fifteen (15) years old. He was also given Wellbutrin… from the time he was eleven (11) years old, until he was fifteen (15) years old." *Petition* at 17 (citations omitted).

impossible to know whether Baker in fact took all of the medication he was prescribed in the manner in which it was prescribed, particularly in light of his and his sister's belief that the drugs "only made him worse." Further, Baker's Exhibit actually establishes that his prescription for Ritalin was discontinued on March 11, 1999, (*See* PC-R Vol. 12-B, p. 220) when Baker was twelve (12) years old, which belies his claim that he was medicated with Ritalin "three (3) times a day…from the time that he was seven (7) until he was fifteen (15)." *See Petition* at 17.

The relevant aspects of Baker's drug and alcohol use mitigation evidence were clearly reflected in the original record on appeal. The record on appeal showed that Baker had been prescribed mental health medications from the time he was seven (7) years old, that Baker did in fact take the medications he was prescribed, but he and his sister believed the medications did not help him. While the specific number of pills he was prescribed during his childhood may be discernible from documents contained in the Exhibit, the specific number of pills Baker actually ingested certainly is not and, even if it was, such would not have affected this court's proportionality review.

There was also a copious amount of evidence before this Court on direct appeal concerning Baker's childhood and adult use of alcohol and marijuana and the missing exhibits add nothing new to the record concerning such. Dr. Krop testified about Baker's history of marijuana and alcohol use when explaining his

diagnosis of polysubstance abuse, (R. Vol. 17 at 97-98) and when asked about the time in his life when he started running with a bad crowd, Baker himself testified about his alcohol and marijuana use as follows:

> Mr. Baker: . . . I had moved to – I guess I had moved to a different school or something and I had met some new friends from the neighborhood. And I started hanging with them and doing the things they were doing. And they was older, much older, much old – about five or six years older than me, and I started smoking weed and… [a]t the age of like ten, selling drugs at the age of 11, like marijuana and cocaine.
>
> Mr. Phillips: And what kind of alcohol were you drinking?
>
> Mr. Baker: Like, nothing too strong, mix it, like Smirnoff, Mike's Hard Lemonade, stuff like that.

(R. Vol. 18, p. 173-174).

Next, Baker inexplicably takes exception with the trial court for failing to make one factual finding which Baker admits had insufficient evidentiary support and for failing to make another factual finding that had no evidentiary support whatsoever. Baker claims, "[t]he trial court erred when it in effect dismissed the report of fetal alcohol exposure, **just because the evidence did not satisfy the criteria for fetal alcohol syndrome.**" *Petition* at 20 (emphasis added). Baker then takes this fallacious argument a step deeper claiming that despite the fact that Baker "does not appear to have the physical characteristics associated with fetal alcohol syndrome (i.e. distinctive facial features, including small eyes, an

exceptionally thin upper lip, a short upturned nose, and a smooth skin surface between the nose and upper lip)" the trial court should have recognized that Baker "consistently presented with the symptoms and features of [Alcohol Related Neurological Disorder.]" (hereinafter "ARND") *Petition* at 20 (citation omitted). Baker admits ARND is a non standard diagnosis[16] and, according to the record, Baker failed to present any evidence, testimonial or otherwise, of ARND during his penalty phase proceedings.

Undiscouraged by this indisputable fact, Baker takes a novel approach and presents a new mitigation theory for the first time during these habeas corpus proceedings. Baker's Petition attempts to introduce evidence to this Court of the history and development of ARND as well as its symptoms.[17] Baker provides no legal support for his contention that the trial court should have made its own diagnosis of ARND without the benefit of any expert testimony concerning said disorder. Even more relevantly, Baker provides no authority to support his contention that this Court could have found that Baker had ARND if the record on appeal been supplemented to include the Exhibit, which also contains no information whatsoever about ARND.

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[16] *See Petition* at 20.

[17] Information about ARND appears for the first time at any stage in these proceedings in Baker's Petition for Writ of Habeas Corpus. *See Petition* at 18-19.

Claims of ineffective assistance of appellate counsel may not be used to camouflage issues that should have been presented on direct appeal or in a postconviction motion, *Rutherford v. Moore*, 774 So. 2d 637, 643 (Fla. 2000). If Baker believes ARND evidence should have been presented during his penalty phase, then he should have alleged such in an appropriate postconviction motion claiming ineffective assistance of trial counsel. Contrary to Baker's contention, the trial court properly "ignore[d] the fact that the reports all list behavioral features that are consistent with [ARND]"[18] because the trial court was simply never advised of the behavioral features of ARND through expert testimony. The fact that ARND is not a standard diagnosis is all the more reason Baker needed to present information about ARND during his penalty phase.

Furthermore, while Respondents agree with Baker's assertion that this Court must be satisfied that the trial court in fact considered all of the evidence in making its determination as to whether the trial court abused its discretion in assigning weight to mitigating circumstances,[19] Respondents wholly disagree with Baker's suggestion that "not all the evidence presented to the trial court was considered or was only considered in such a perfunctory way as not to be a meaningful review."

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[18] *See Petition* at 18.

[19] *See Petition* at 21 (*citing Rogers v. State*, 783 So. 2d 980 (Fla. 2001) and *James v. State*, 695 So. 2d 1229, 1237 (Fla. 1997)).

Petition at 21. Tellingly, Baker's Petition cites to no perfunctorily considered or unconsidered evidence to support this bare assertion. Moreover and also tellingly, Baker takes a radical change in this theory in his subsequent claim (Claim II) which alleges that the trial court's consideration actually went above and beyond the evidence introduced at trial when assigning weight to Baker's mitigating circumstances. *See Petition* at 24 ("The Sentencing Order includes details that are not found in the trial testimony, leading to the conclusion that the trial court also reviewed the actual report [which was never introduced into evidence]")

F. The Case Law Cited by Baker is Clearly Distinguishable.

The instant case is easily distinguishable from the case Baker cites in support of his claim, *Crook v. State*, 908 So. 2d 350 (Fla. 2005). *Crook* involved a death penalty case wherein the record demonstrated "substantial and unrebutted evidence of brain damage and other mental defects that the mental health experts related to the… murder." *Id*. at 352. Crook was found to have "suffered from frontal lobe brain damage, most likely resulting from trauma sustained when he was beaten as a child with a pipe" and an expert testified that "Crook was under the influence of an extreme mental or emotional disturbance at the time he committed the crime, and that his brain damage was responsible for this." *Id*. In the instant case, Dr. Krop's finding of frontal lobe impairment is far cry from the substantial and unrebutted evidence of brain damage found in *Crook*, and Baker

failed to present any evidence that brain damage *per se* was responsible for placing him under the influence of extreme emotional disturbance at the time he committed his crime.

In contrast, the analysis of Baker's claim is more similar to the analysis this Court utilized in its recently decided opinion in *State v. Woodel*, 39 Fla.L.Weekly S383 (2014). In *Woodel*, the State appealed from a postconviction court's ruling granting Woodel a new penalty phase hearing due to Woodel's claim that his trial counsel was ineffective for failing to fully explore Woodel's personal history and family background. *Id*. at S385. Although the trial court originally found that substantial mitigating circumstances existed, the postconviction court concluded that Woodel was entitled to a new penalty phase because Woodel's penalty phase counsel neglected to explore other available mitigating circumstances. *Id*. at S384.

On appeal, this Court "agree[d] that counsel failed to explore other mitigation about Woodel's personal history and his multigenerational family background" and failed to explore his "background stemming from his childhood years in Michigan and North Carolina." *Id*. at S385-S386. However, this Court held that Woodel had not been prejudiced under the *Strickland* standard "because the additional potential mitigating circumstances were of relatively minor importance and, therefore the lack thereof does not undermine our confidence in the outcome of Woodel's 2004 penalty phase." *Id*. at S386. Similarly, any

potential mitigating circumstances contained in Baker's missing exhibits which did not appear on the record in the form of witness testimony, such as the omitted minutia contained in the records Dr. Krop did address during his testimony and the contents of the medical records concerning Baker's bout with bronchitis and his automobile accident which Dr. Krop did not address during his testimony, is also "of relatively minor importance" and the absence of such from the record during this Court's consideration of Baker's direct appeal should not undermine this Court's confidence in its outcome.

The instant case also bears another striking similarity to *Woodel* in that this Court relied upon unimpeached expert testimony concerning Woodel's life history and relevant family background in finding that Woodel was not prejudiced by his counsel's failure to investigate additional personal background information. *See Id.* at S386. ("A review of Dr. Dee's unimpeached, expert testimony before the jury in 2004 demonstrates to our satisfaction that Woodel's troubled background was comprehensively presented to the jury"). Like in *Woodel*, presentation of Baker's personal, mental health and medical histories was comprehensively presented through the extensive unimpeached expert testimony of Dr. Krop. *See also Id.* ("We further conclude that the presentation of Woodel's personal history and family background was instrumentally accomplished through the extensive expert testimony provided by Dr. Dee").

Baker's appellate counsel did not commit serious error by failing to supplement the record to include the missing exhibits in light of their cumulative nature and relatively minor importance. Even if appellate counsel did commit serious error by failing to supplement the record, Baker failed to establish that he was prejudiced by the omission of the Exhibit from the record on appeal. Accordingly, this Court should deny Claim I of Baker's Petition.

CLAIM II

BAKER'S APPELLATE COUNSEL DID NOT COMMIT SERIOUS ERROR BY FAILING TO MOVE THE COURT TO SUPPLEMENT THE RECORD TO INCLUDE THE APRIL 24, 2002 ACT CORPORATION EVALUATION REPORT AND BAKER WAS NOT PREJUDICED BY THE FACT THAT THE REPORT WAS MISSING FROM THE RECORD ON APPEAL.

On pages 23-25 of the Petition, Baker claims his appellate counsel was ineffective for failing to move the court to supplement the record to include, specifically, an April 24, 2002, ACT corporation evaluation report (hereinafter "Report"), thereby causing an incomplete record to be reviewed on direct appeal. Baker claims his appellate counsel's ineffectiveness deprived this Court of the opportunity to review all relevant evidence, rendering Baker's death sentence unreliable in violation of the Fifth, Sixth, Eighth, and Fourteenth amendments to the U.S. Constitution and the corresponding provisions of the Florida Constitution. *Petition* at 23. Baker points out that this Report was discussed during witness

testimony but never submitted into evidence and takes exception with the trial court's reference to information contained in the Report in its Sentencing Order. *Id*. at 23-24. Since Baker did not claim error on direct appeal regarding the trial court's reference to the Report in its sentencing order, Baker is procedurally barred from seeking any relief for this alleged trial court error in the instant habeas corpus proceeding. *Schoenwetter v. State*, 46 So. 3d 535, 563 (Fla. 2010) (Claims of ineffective assistance of appellate counsel may not be used to camouflage issues that should have been presented on direct appeal or in a postconviction motion) (citations omitted).

The fact that the Report at issue was not technically admitted into evidence at trial appears to be the sole distinction between this claim and Claim I of Baker's *Petition*, which alleges ineffective assistance of appellate counsel for failing to supplement the record to include his composite Exhibit, which was admitted into evidence. Respondents respectfully contend this distinction does not affect the application of the legal standards outlined in pages 18-21 *supra* concerning claims of ineffective assistance of appellate counsel and missing records on appeal, and therefore respondents re-allege and incorporate said legal precedents by reference herein.

The trial court finding with which Baker takes issue reads, "In an evaluation dated April 24, 2002, ACT corporation clinical specialist Rhonda McIntire noted

the defendant has a 'strong street sense.'" (R. Vol.4 p. 567). The trial testimony on record regarding this Report reads as follows:

> MR. CLINE: Doctor, you referred several times to this Act corporation that the defendant was referred to where he received some psychological aid and testing and things of that nature. Is that correct?
>
> DR. KROP: Primarily, therapy through Act. But yes, there was assessments done.
>
> MR. CLINE: Okay. Now I realize you've had this material since 2007 and I'm just now receiving this stuff, but let me show you something that I found just the other night, and ask if you recognize this particular document from the Act Corporation (tendering)
>
> DR. KROP: It was part of the documents that I reviewed, yes.
>
> MR. CLINE: Okay. And would you explain to the jury what number 14 represents?
>
> DR. KROP: This is the history and evaluation that was done when he was 15 years old. This was in April of 2002…
>
> Number 14 is assessment of – assessment, summary and recommendations of strengths, weaknesses and needs. And according to that, he had some speech deficits, does not effect socialization. Intelligence, normal. Has strong street sense, likes to listen to music.

(R. Vol. 17, p. 109-110).

Respondents agree that a comparison between the trial court's reference to the Report in its Sentencing Order to the testimony concerning the Report leads to the conclusion that the name of the evaluator and the specific date of the evaluation (i.e. the **24th** of April, 2002) must have been gleaned from something other than Dr.

Krop's testimony. However, the crux of the issue, namely Baker's normal intelligence and "strong street sense," was testified to by Dr. Krop, and any confusion as to whether the Report was introduced into evidence along with all of the other numerous documents Baker introduced in his composite Exhibit was clearly caused by the defense.

Because Dr. Krop testified that the Report was "part of the documents [he] reviewed,"[20] it was certainly understandable for anyone involved in this trial to believe that the Report had been introduced into evidence, particularly in light of the following statements of Baker's counsel at the time the Exhibit was introduced:

> MR. PHILLIPS: Your Honor, at this time, I'd like to introduce into evidence as defendant's composite, what was marked earlier as Defendant's Composite Exhibit A, **the reports that Dr. Krop relied upon during his evaluation process,** combined with the reports that he prepared, as Defendant's Exhibit Number 1 at this time.

(R. Vol.17, p.104) (emphasis added).

Further, as explained by the state in the following excerpt, the blitzkrieg of documentation the defense disclosed late in the proceedings certainly contributed to the confusion concerning the admission of this Record into evidence:

> THE COURT: Any objection?
>
> MR. CLINE: Can I take a look at it, your Honor?

[20] (R. Vol. 17, p. 109).

> THE COURT: Please do.
>
> MR. CLINE: Just for the record, Your Honor, I just want to make it clear that all of this stuff that's being introduced by the defense, including this entire accordion file of information, is all stuff that was handed to me late last week, so I was struggling to go through this stuff. And it was frustrating to the state, this stuff has been in the hands of the defense since obviously 2007.
>
> I just want to place on the record, that we're really getting put in a box here about entering things into evidence that have just been handed to me, literally this morning.
>
> Other than that, Your Honor, I have no further objection.

(R. Vol.17, p.104-105).

Next, Baker's claim takes another radical turn in logic. After objecting to the trial court's consideration of the Report because it was not formally introduced into evidence, Baker contends this Court's consideration of the Report, if it had been supplemented into the record on appeal by his appellate counsel, would have created "a reasonable probability that the outcome of his appeal would have been different." In support, Baker claims the prognosis that he was a low to moderate risk of suicide shows proof that Baker suffered from extreme emotional disturbances. *Petition* at 24-25. This argument is meritless.

In reality, the Report does more harm than good to Baker's claim of extreme emotional distress, which may very well be the reason Baker's trial counsel chose not to admit it into evidence at trial. Although the Report indicates that the referral

to the social worker was made because Baker was allegedly seen tying a sheet around his neck, Baker denied that he ever did so, specifically claiming the report was false. *Petition* at Appendix A. Furthermore, the Report indicates that Baker: denied any depression; reported that he had a couple of class friends, attended church, and was spiritual; denied feeling suicidal; appeared to the evaluator as having normal intelligence[21] and a strong street sense; and liked to listen to music. *Id*. The only potential mitigation value to this Record would be its indication of suicidal thoughts or tendencies; however, this purported mitigation evidence rings hallow when considering the fact that Baker: a) specifically denied the allegation that he tied a sheet around his neck; b) denied having depression or suicidal thoughts; c) never mentioned suicidal thoughts or tendencies during his penalty phase testimony; and d) never submitted or proffered any other evidence to support the proposition that he had suicidal thoughts or tendencies. (*Id*.) (R. Vol. 17 p. 167-183) (R. Vol. 20 p. 75-86).

[21] Baker was fifteen (15) at the time of this evaluation, making this Report one of the more recent assessments. *Id*. This fact is noteworthy because Baker's IQ scores increased as he aged (IQ improved from 74 at age 7 to 81 at age 20) and Baker's ADHD also improved as he aged (Dr. Krop "got a sense that some of the hyperactivity disorder is not as severe as it used to be" and "would only diagnose him with Attention Deficit Disorder"). (R. Vol. 17, p, 66, 83, 96).

Since this Report did little to support Baker's claim of extreme emotional distress and actually contradicted Baker's claim of borderline intelligence, appellate counsel cannot be found to have committed serious error by failing to supplement the record on appeal to include such. Further, Baker has failed to demonstrate how he was prejudiced by the omission of this Report from the record on appeal. Accordingly, this Court should deny this claim.

CONCLUSION

Based on the foregoing authority and arguments, the Respondents respectfully request that this Honorable Court deny Baker's petition for a writ of habeas corpus.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the following by E-MAIL on July 15, 2014: 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; CCRC-Middle, 3801 Corporex Park Drive, Suite 210; Tampa, FL 33619-1136.

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CERTIFICATE OF COMPLIANCE

This brief is typed in Times New Roman 14 point font.

/s/ JDR

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