IN THE SUPREME COURT OF FLORIDA

CASE NO. SC17-1725

JOHN WILLIAM CAMPBELL,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF FIFTH JUDICIAL CIRCUIT IN AND FOR CITRUS COUNTY, FLORIDA
Lower Tribunal No. 2010-CF-1012

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Direct Appeal

The complete facts of Campbell's direct appeal can be found in *Campbell v. State*, 159 So. 3d 814 (Fla. 2015). Campbell's conviction and sentence were upheld on direct appeal, although this Court did strike the finding of the aggravating factor that the murder was especially heinous, atrocious, and cruel. *Id.* at 834.

Postconviction Proceedings

On September 19, 2016, Campbell filed an initial motion for postconviction relief. After subsequent amendments, Campbell raised the following claims: 1) trial counsel was ineffective for failing to make contact with Campbell after his arrest, which led to several involuntary statements to law enforcement; 2) trial counsel was ineffective for failing to object to six comments made by the prosecutor during closing arguments; 3) trial counsel was ineffective for opening the door to aggravating circumstances; 4) trial counsel was ineffective for failing to develop mitigation; 5) cumulative effect of the errors warrants reversal; 6) Campbell's death sentence violates the Sixth Amendment; 7) the new death penalty statute renders his death sentence unconstitutional; 8) Florida's death penalty is unconstitutional under the Eighth Amendment; 9) Florida's lethal injection protocol is unconstitutional; 10) section 945.10 is unconstitutional for exempting the identities of the execution team

members from public records disclosure; and 11) Campbell might lack mental capacity at the time of his execution. (PCR, V1, R292-447; 520-97).[1]

Pursuant to recent United States and Florida Supreme Court decisions, the postconviction court granted Claim 6, granting Appellant a new penalty phase hearing. Claims 2 (subsections 2 to 5), 3, 4, 7, 8, 9, 10, and 11 were dismissed as moot since they were about appealed issues in the penalty phase. (PCR, V1, R841, 1289-1309). An evidentiary hearing was held on June 8, 2017 for Claims 1, 2 (subsections 1 and 6), and 5. (PCR, V1, R867-1074). Following the evidentiary hearing, the postconviction court issued a ruling denying postconviction relief. (PCR, V1, R1172-1274).

Testimony from the Evidentiary Hearing

Dr. James O'Donnell

Dr. O'Donnell is a licensed pharmacist in Illinois. He is an associate professor of pharmacology at Rush Medical College, and works as a consultant for Pharmaconsultants, where he consults in litigation on drug-related matters. (PCR, V1 R875, 878). Dr. O'Donnell has a master's degree in nutrition, a doctorate in pharmacy, and a bachelor's degree in pharmacy. (PCR, V1, R876). His pharmacology training included several courses in drug therapy, drug development,

[1] Cites to the postconviction record are PCR, V_, R_. Cites to the direct appeal record are DAR, V_, R_.

drug analysis, and drug literature. (PCR, V1, R880). He has conducted more than a thousand evaluations on patients throughout the course of his career regarding drug effects, drug interactions, and drug use. (PCR, V1, R882). Over the course of his career, Dr. O'Donnell published more than three-hundred articles, and had previously testified as an expert primarily as a pharmacologist and occasionally as a pharmacist. (PCR, V1, R885). Dr. O'Donnell admitted that he had never testified on behalf of the prosecution. (PCR, V1, R930). Dr. O'Donnell's compensation rate is $450 per hour. (PCR, V1, R932). He testified that he worked between forty and fifty hours on Campbell's case. (PCR, V1, R932).

Dr. O'Donnell was hired by postconviction counsel in August 2016 to review the medical records of Campbell's hospitalization and to evaluate whether the medication that was given to Campbell influenced Campbell's ability to think clearly. (PCR, V1, R888). As part of his review of Campbell's case, Dr. O'Donnell reviewed the police reports, the air ambulance reports, hospital records, and the jail records. (PCR, V1, R888-89). Dr. O'Donnell also reviewed the pleadings in Campbell's case, and interviewed Campbell in prison. (PCR, V1, R889). The interview was conducted on March 29, 2017, and lasted for approximately ninety minutes. (PCR, V1, R895).

Relying on Campbell's self-reported history, Dr. O'Donnell determined Campbell was "opiate naïve," which is a term used to describe someone who does

not have significant experience with opiates. (PCR, V1, R898). According to Dr. O'Donnell, Campbell had no tolerance for opiates even though Campbell had extensive experience with cocaine and methamphetamine. (PCR, V1, R898-99).

Dr. O'Donnell testified about the effects of the medications Campbell was taking when he was questioned by police. He testified that diprivan can be used as a sedative on intensive care patients to prevent them from fighting a respirator. (PCR, V1, R903). He said morphine is a central nervous system depressant that relieves pain. (PCR, V1, R904). He testified that oxycodone is like morphine, but since it is taken orally it takes longer for it to be processed, and the levels are never as high as with morphine. (PCR, V1, R904-05). He also stated that continuous release oxycodone, or Oxycontin, is a pill designed to allow for continuous release of small amounts of the drug throughout the day, for convenience. (PCR, V1, R905-06).

Dr. O'Donnell prepared a chart showing what drugs Campbell was administered, and the days he spoke to police. On August 12, 2010, Campbell received a continuous IV drip of diprivan at the rate of 192 mg per hour from 5:00 A.M. to 12:00 P.M., and received 3 doses of morphine at 8:00 A.M., 10:34 A.M., and 12:15 P.M. (PCR, V1, R916-17). He spoke to the police between 1:00 and 2:00 P.M. that day. (PCR, V1, R919).

The next day, on August 13, 2010, Campbell received 8 mg doses of morphine at 5:10 A.M., 6:15 A.M., 9:40 A.M., and 10:55 A.M. He spoke to police between

11:15 and 11:45 A.M. that day. Finally, Dr. O'Donnell testified that Campbell was more stable on August 16, 2010, four days after the last police interview, and needed only oral analgesics. (PCR, V1, R920). That day, Campbell received a continuous release version of 20 mg oxycodone at 8:34 A.M., and then two smaller doses of 5 mg immediate release oxycodone at 8:35 A.M. and 11:24 A.M. (PCR, V1, R920). He was questioned between 3:00 and 4:00 P.M. that day. (PCR, V1, R921). Dr. O'Donnell gave the opinion that at each time Campbell spoke to police, he was impaired by the drugs. (PCR, V1, R919-21). However, Dr. O'Donnell admitted that Campbell was given a standard dosage for each medication he had taken. (PCR, V1, R942).

Dr. O'Donnell also admitted that in Campbell's recorded statement to law enforcement given while he was hospitalized, he appeared to understand the detective's questions. (PCR, V1, R942). Similarly, Dr. O'Donnell testified that there was nothing in Campbell's recorded statements to suggest that Campbell was hysterical, crying, or in a rage. (PCR, V1, R926-27). Dr. O'Donnell acknowledged that his opinions that Campbell was opiate naïve and that his statements to police were based solely on what Campbell told him regarding his reaction to drugs. (PCR, V1, R933).

Michael Lamberti

Michael Lamberti is currently the supervisor of the public defender's office in Sumter County, and has worked for the public defender's office since 2009. (PCR, V1, R949, 951). Over the course of his career, he has tried between ninety-five and one-hundred ten cases, ten of which involved first-degree felonies. (PCR, V1, R952).

Mr. Lamberti was assigned as second-chair in Campbell's case and was primarily responsible for the penalty phase. (PCR, V1, R955). He also took it upon himself to see Campbell in person on a regular basis. (PCR, V1, R955). Mr. Lamberti testified that the trial strategy in Campbell's case was to attempt to get a conviction for second-degree murder and to show that Campbell was remorseful for his father's murder. (PCR, V1, R958).

Mr. Lamberti also stated that he handled Mr. Campbell's first appearance on August 17, 2010, the same day that the Public Defender's Office was appointed. (PCR, V1, R962). Mr. Lamberti said that he was not aware of anyone from the public defender's office having a "comprehensive" discussion with Campbell about his case prior to August 17, 2010. (PCR, V1, R969). Mr. Lamberti explained that the public defender's office is appointed only after the court finds that a defendant is indigent, and that first appearance occurs only after a formal arrest. (PCR, V1, R985-86).

On August 17, 2010, the public defender's office executed a "notice of intent to invoke right to counsel and exercise the right to remain silent" form on Campbell's

behalf. (PCR, V1, R971). Mr. Lamberti said the form is typically filed with the court file, and that it is also sent to the investigative agency and the jail. A copy is also given to the client. (PCR, V1, R971-72). No other document purporting to invoke Campbell's right to remain silent was executed prior to August 17, 2010. (PCR, V1, R973).

Mr. Lamberti testified that the policy of the public defender's office is to visit with a defendant within 72 hours of being appointed to a defendant's case. (PCR, V1, R979). Mr. Lamberti has never visited with a defendant prior to being appointed to the defendant's case. (PCR, V1, R979-80). August 20, 2010, three days after the Public Defender's Office was appointed to represent Campbell, Mr. Lamberti met with Campbell to discuss his case. (PCR, V1, R973). During the meeting, Mr. Lamberti discussed Campbell's psychiatric history, and learned of Campbell's statement to law enforcement at the hospital. (PCR, V1, R976-77). During the meeting, Mr. Lamberti advised Campbell not to speak with law enforcement. (PCR, V1, R976).

Mr. Lamberti said that he and the lead counsel decided not to file a motion to suppress Campbell's recorded statements to law enforcement, because the statements showed remorse for the murder. (PCR, V1, R983). Mr. Lamberti also did not think there was a legal basis to suppress the statements. (PCR, V1, R983-84). Mr. Lamberti explained that the decision not to file a motion to suppress Campbell's

statements was a part of the trial strategy to have the jury spare Campbell's life. (PCR, V1, R985).

Thomas Devon Sharkey

Thomas Sharkey has been employed as assistant public defender for the Fifth Judicial Circuit since 1998, and has handled capital cases since 2009. (PCR, V1, R989-90).

Mr. Sharkey became involved with Campbell's case in late July or early August 2012 after lead counsel retired. (PCR, V1, R995-96). Like Mr. Lamberti, Mr. Sharkey testified that the trial strategy was to try and get a conviction on reduced murder charge. (PCR, V1, R1002). Mr. Sharkey stated that the State's strongest evidence of premeditation were the statements made by Campbell while he was incarcerated at the county jail, not the statements made by Campbell when he was hospitalized. (PCR, V1, R1003). Mr. Sharkey testified counsel made a strategic choice not to file a motion to suppress Campbell's hospital confessions because the statements showed remorse. (PCR, V1, R1024).

As to the prosecutor's "manipulative ass" remark, Mr. Sharkey stated that he did not move for a mistrial or request an individual voir dire of the jurors because he did not want to draw attention to the incident. (PCR, V1, 1014). Regarding the prosecutor's remarks to the jury about acquitting Campbell if they believed Campbell's version of events, Mr. Sharkey stated that he did not think the

prosecutor's remarks were objectionable. (PCR, V1, R1012). He also said that he chose to respond to the prosecutor's comment directly in his own closing argument. (PCR, V1, R1012).

SUMMARY OF ARGUMENTS

ISSUE I: Trial counsel was not ineffective for deciding not to move to suppress Appellant's statements, and that the postconviction court correctly ruled that the statements were not involuntary. This claim is procedurally barred because it could have been raised on direct appeal. However, even if it had been, it would not have prevailed. Appellant's own expert testified that Appellant sounded the same in his police interviews as he did when the expert interviewed him much later at the jail, when he was not receiving medical treatment. That expert also never gave an opinion that the statements were involuntary, he merely stated that Campbell was impaired at the time. Impaired individuals can give voluntary statements to the police. Finally, the decision to not suppress the statements was a valid trial strategy, as trial counsel wanted the jury to hear Appellant's remorse in an effort to obtain a second-degree murder conviction.

ISSUE II: The postconviction court correctly ruled that trial counsel did not have a duty to Appellant until they were appointed, and correctly excluded the testimony of defense counsel's purported expert witness on ineffective assistance of counsel. Appellant argues that trial counsel was ineffective in not employing a "rapid

response" to get to Appellant immediately after he was arrested. However, the record reflects that trial counsel did just that—after they were appointed. A lawyer has no duty to an individual until they actually represent that individual. All of Appellant's conversations with police occurred before trial counsel was appointed, and trial counsel made contact with Appellant the day they were appointed. Defense counsel's expert witness, Adam Tebrugge, was planning to give his expert opinion that trial counsel was ineffective for not making contact with Appellant immediately after his arrest, before they were ever appointed. As his testimony would have been solely regarding a time when trial counsel was not representing Appellant, his testimony was irrelevant to any ineffective assistance of counsel claim before the court.

ISSUE III: The postconviction court correctly ruled that trial counsel did not have a basis to object to the prosecutor's remark in closing argument, or move for a mistrial for a remark the prosecutor made to his co-counsel. In closing, the prosecutor made a comment to the jury that if they wanted to believe Appellant, he couldn't stop them, and they could let Appellant walk out of the courtroom. Appellant contends this improperly shifted the burden to the defense, and that trial counsel should have objected and moved for a mistrial. However, this argument was not telling the jury to convict if they believed Appellant, it was instead telling them if they believed him, they could acquit. This is a perfectly valid argument for a

prosecutor to make. Also, in context with the rest of his closing, he was making an argument to the jury to weigh the Appellant's testimony like any other witness's, and make a credibility finding based on the other testimony and other evidence before them. As these were valid arguments, trial counsel was not ineffective for failing to object to them. As to the remark the prosecutor made to his co-counsel earlier in the trial while Appellant was testifying, it was not grounds for a mistrial. First, there is no evidence that any juror heard the remark. Trial counsel made the valid strategic decision do not inquire into the jury, which would only have served to highlight the comment and the incident. Second, even had a juror or the entire jury heard the remark, the error is harmless. The comment is no so egregious or over the line as to vitiate the entire trial, and so a motion for mistrial would have been properly denied even if the jury heard the remark.

ISSUE IV: All of Appellant's individual claims are meritless; therefore, there is no cumulative error.

STANDARD OF REVIEW

Ineffective assistance of counsel claims are a mixed question of law and fact. As such, this Court reviews the lower court's legal rulings *de novo*, and defers to the lower court's factual findings as long as they are supported by competent substantial evidence. *See Foster v. State*, 132 So. 3d 40, 52 (Fla. 2013)

A lower court's ruling on evidentiary matters is reviewed under an abuse of discretion standard. *Frances v. State*, 970 So. 2d 806, 813-14 (Fla. 2007).

INEFFECTIVE ASSISTANCE OF COUNSEL – APPLICABLE LEGAL STANDARDS

The United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984) promulgated a two-pronged test to determine whether counsel's performance was so defective as to require a reversal of a verdict or sentence. *Strickland,* 466 U.S. at 687. First, the defendant must show counsel's performance was deficient. This showing of deficiency requires the criminal defendant to establish that his counsel made errors so serious that the defendant was deprived of counsel as contemplated by the Sixth Amendment. Second, the defendant must establish counsel's deficient performance resulted in prejudice. "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. at 687.

Under *Strickland*, the claimant has the burden of identifying particular acts or omissions of the lawyer that are outside the broad range of reasonably competent performance under prevailing professional standards. Second, the movant must demonstrate that the clear, substantial deficiency so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined. In *Strickland*, the United States Supreme Court refrained from providing specific guidelines to evaluate counsel's performance. Instead, the Court held "[t]he proper

measure of attorney performance remains simply reasonableness under prevailing professional norms." *Strickland*, 466 U.S. 668. In evaluating counsel's performance under *Strickland*, there is a strong presumption that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." 466 U.S. at 690.

The defendant must "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id*. at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)). Additionally, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689.

A court considering a claim of ineffectiveness of counsel need not make a specific ruling on the performance component of the test when it is clear that the prejudice component is not satisfied. *Ferrell v. State*, 29 So. 3d 959, 969 (Fla. 2010), *citing Maxwell v. Wainwright*, 490 So. 2d 927, 932 (Fla. 1986). Prejudice exists for purposes of ineffective assistance of counsel claims, only if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to

undermine confidence in the outcome." *Id.* at 694; *see Porter v. McCollum*, 558 U.S. 30, 55-56 (2009) .

Because a court can make a finding on the prejudice prong of *Strickland* without ruling on the deficiency prong, claims of ineffective assistance of counsel are subject to summary denial when the court can determine the outcome of the proceeding would not be affected even if counsel were deficient. *Franqui v. State*, 59 So. 3d 82 (Fla. 2011); *Troy v. State*, 57 So. 3d 828, 828 (Fla. 2011); *Walls v. State*, 926 So. 2d 1156, 1173 (Fla. 2006) (summary denial appropriate on ineffective assistance of counsel claim where evidence was cumulative); *Freeman v. State*, 761 So. 2d 1055, 1063 (Fla. 2000). *See also Duest v. State*, 12 So. 3d 734, 747 (Fla. 2009); *Stewart v. State*, 801 So. 2d 59, 65 (Fla. 2001) (Because the *Strickland* standard requires establishment of both the deficient performance and prejudice prongs, when a defendant fails to make a showing as to one prong, it is not necessary to delve into whether he has made a showing as to the other prong). "Failure to sufficiently allege both prongs results in a summary denial of the claim." *Spera v. State*, 971 So. 2d 754, 758 (Fla. 2007) (citing *Thompson v. State*, 796 So. 2d 511, 514 n. 5 (Fla. 2001)).

ARGUMENT

ISSUE I: THE POSTCONVICTION COURT CORRECTLY RULED THAT APPELLANT'S CONFESSIONS AND MIRANDA2 WAIVERS WERE NOT

[2] *Miranda v. Arizona*, 384 U.S. 436 (1966).

INVOLUNTARY, AND THAT TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO MOVE TO SUPPRESS THE STATEMENTS.

Campbell alleges that trial counsel was ineffective for failing to move the court to suppress the statements made to law enforcement. Specifically, Campbell alleges that the statements made to law enforcement while he was hospitalized were involuntary because he was under the influence of medication at the time he made the statements. There is no evidence in the record to suggest that the statements were involuntary even accounting for the fact that Campbell was given pain medication. Furthermore, trial counsel's decision not to file a motion to suppress was a reasonable trial strategy, given that the statements showed Campbell's remorse for the murder. Thus, Campbell's claim is without merit and must be denied.[3]

To prevail on a claim of ineffective assistance of counsel for failing to litigate a suppression issue, a defendant has the burden of proving that the suppression claim is meritorious. *See Zakrzewski v. State*, 866 So. 2d 688, 694 (Fla. 2003). Thus, where

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[3] To the extent that Campbell alleges that his statements to law enforcement were involuntary and should have been suppressed, Campbell's claim is procedurally barred from consideration, because the issue could have been raised on direct appeal. *See Griffin v. State*, 866 So. 2d 1, 14-15 (Fla. 2003) (stating that issues that could have been, but were not, raised on direct appeal are not cognizable through collateral attack in motion for postconviction relief); *See also Valle v. Moore*, 837 So. 2d 905, 908 (Fla. 2002) (issues not properly preserved cannot be raised on appeal unless deemed fundamental error) *See also*, *Del Valle v. State*, 52 So. 3d 16, 18 (Fla. 2nd DCA 2010) (However, issues that were fundamental error in the trial can be addressed in a collateral attack.)

there is no meritorious suppression argument regarding the allegedly improperly admitted evidence, trial counsel is not ineffective for failing to file a motion to suppress the evidence. *Lynch v. State*, 2 So. 3d 47, 67-68 (Fla. 2008).

The mere fact that a suspect was under the influence of alcohol or drugs when questioned does not render his statements inadmissible as involuntary. "The rule of law seems to be well settled that the drunken condition of an accused when making a confession, unless such drunkenness goes to the extent of mania, does not affect the admissibility in evidence of such confession, but may affect its weight and credibility with the jury." *Thomas v. State*, 456 So. 2d 454, 458 (Fla. 1984) *quoting Lindsey v. State,* 66 Fla. 341, 343, 63 So. 832, 833 (1913). The fact that a suspect is under the influence of drugs or medication is irrelevant if the suspect's statement was "the product of a rational intellect and a free will." *Mincey v. Arizona*, 437 U.S. 385, 398, (1978) (quoting *Townsend v. Sain,* 372 U.S. 293, 307 (1963).

At the evidentiary hearing, Campbell presented the testimony of Dr. O'Donnell regarding the medications administered to Campbell. Dr. O'Donnell also testified about the interview he conducted with Campbell in prison. Dr. O'Donnell opined that Campbell was "opiate naïve" and had a low tolerance for opiate narcotics. Thus, according to Dr. O'Donnell, Campbell was impaired by the drugs he was taking when he spoke to law enforcement.

However, Dr. O'Donnell admitted that his conclusion that Campbell was "opiate naïve" was based on Campbell's own statements to him about the effects of the medication, and not based on any independent observations made by him as part of his assessment of Campbell. Also, Dr. O'Donnell admitted that he listened to Campbell's interview with law enforcement, and that there was nothing in Campbell's statements to conclude that Campbell did not understand the questions asked of him, or had any difficulty communicating with law enforcement. When questioned by the judge, Dr. O'Donnell's description of the Appellant being coherent and properly answering questions was the same during the doctor's discussion with him at the jail – when he was not on any medication – as the Appellant sounded in the police interviews. Dr. O'Donnell also admitted that all the medications given to Campbell were normal dosages for each drug.

Furthermore, Mr. Sharkey testified that there was nothing in Campbell's statements to law enforcement to indicate that the statements were involuntarily given. Mr. Sharkey concluded that he had no legal basis to file a motion to suppress, because there was no indication that the statements were involuntary, or otherwise inadmissible.

In his order, the postconviction court judge found that any claim Appellant's confessions were involuntary were not supported by the record. This finding is supported by competent substantial evidence. As noted above, Dr. O'Donnell

testified that Appellant sounded the same in the police interviews, when he was on medications, as he did when the doctor met him at the jail. Dr. O'Donnell also never had a chance to interact with the Appellant at the time he was on medications, and the only evidence he had to support the idea the Appellant is opiate naïve was a story told to him by the Appellant. Additionally, the doctor undercut the argument the Appellant was impaired when the doctor testified that one of the things pain can do is overcome the effects of a drug like morphine, and can have a protective effect to the toxicities of those drugs. It is well-supported in the record that the Appellant was experiencing pain at the time of the interviews. According to the doctor's own testimony, the Appellant's pain could have been counteracting the effects of the drugs.

Moreover, trial counsel's decision not to file a motion to suppress was a reasonable trial strategy. The law is well-settled that "[s]trategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct." *Occhicone v. State*, 768 So. 2d 1037, 1048 (Fla. 2000).

Additionally, "[t]he defendant carries the burden to overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Johnston v. State*, 63 So. 3d 730, 737 (Fla. 2011) (citations omitted).

At the evidentiary hearing, Mr. Sharkey testified that he wanted the jury to hear Campbell's interview with law enforcement, because in it, Campbell expressed remorse for the murder of his father, and was very emotional about the circumstances surrounding his father's murder. Mr. Sharkey hoped that, based on the remorse expressed by Campbell, the jury would empathize with Campbell, and either convict Campbell of a lesser offense, or recommend a life sentence at the end of the penalty phase. The fact four out of the twelve jurors ultimately voted for life instead of death suggests this may have been a sound strategy.

Therefore, Campbell has not met his burden of overcoming the presumption that trial counsel's decision not to file a motion to suppress was a reasonable trial strategy. *See Lawrence v. State*, 969 So. 2d 294, 308-09 (Fla. 2007) (holding that trial counsel was not ineffective for not filing a motion to suppress, because trial counsel's strategy of using the defendant's statements to show that the co-defendant was more culpable was a reasonable trial strategy). Hence, because Mr. Sharkey's decision was a reasonable trial strategy, Mr. Sharkey's performance cannot be deemed deficient. In addition, procuring an expert and attempting to suppress the statements would have been contrary to trial counsel's chosen strategy, since they wanted the jury to hear Appellant's remorse. The fact that collateral counsel would have chosen a different strategy does not render trial counsel's decision in the instant case unreasonable in hindsight. *See Cooper v. State*, 856 So.2d 969, 976 (Fla. 2003)

("The issue before us is not 'what present counsel or this Court might now view as the best strategy, but rather whether the strategy was within the broad range of discretion afforded to counsel actually responsible for the defense.'") (quoting *Occhicone*, 768 So. 2d at 1049). Thus, because Campbell cannot establish that he had a meritorious argument that his statements were involuntarily made, trial counsel was not ineffective for failing to file a motion to suppress.

Likewise, Appellant has failed to establish prejudice. Not only must Appellant establish his motion to suppress would have been granted, but also that the result of the proceedings would have been to his advantage. Appellant has failed to do so; therefore, there is no prejudice. The admission of Appellant's confessions are not as destructive and prejudicial as postconviction counsel claims because they were in fact not the only evidence of premeditiation, and not his only confessions. Before crashing into the police car, Appellant confessed the murder to State witness Margaret Driggers, long before he was in the hospital or taking any medications. The State also presented other evidence of heightened premeditation. Other evidence presented at trial was that the victim had no defensive wounds, implying he was sleeping or ambushed when he was struck. This shows the Petitioner was not acting on impulse or in the middle of a heated argument, but had an opportunity to consider his actions before striking. In addition to that evidence, these photographs showed that not only was the victim struck multiple times, he was struck with such force as

to cave in his skull and drive the axe into his brain multiple times. Evidence of multiple injuries to the head can allow a reasonable jury to conclude Appellant acted with a premeditated intent to kill. *See Hodges v. State*, 55 So. 3d 515, 541 (Fla. 2010). The force of the impact these four photographs show, the fourth in particular, helped reveal that Appellant was striking with full strength on an unarmed, unprepared opponent, which can further cement a finding a premeditation. Appellant made confessions before ending up the hospital, and there was ample, uncontroverted evidence of premeditation, so Appellant has failed to show any prejudice even if trial counsel was ineffective for not moving to suppress the statements.

ISSUE II: THE POSTCONVICTION COURT CORRECTLY RULED THAT TRIAL COUNSEL DID NOT HAVE A DUTY TO APPELLANT UNTIL THEY WERE APPOINTED, AND CORRECTLY EXCLUDED THE TESTIMONY OF ADAM TEBRUGGE.

The postconviction court found that trial counsel could not be found ineffective for not providing "prompt assistance" or a "rapid response" to Appellant before he was questioned at the hospital or in the jail. The record and testimony at the evidentiary hearing clearly reflect that all interviews with police happened on or before August 16, 2010. The Public Defender's Office was not appointed to represent Appellant on any case until August 17, 2010, and spoke to Appellant that same day. Further, the Public Defender's Office was not appointed to represent Appellant on his murder charge until September 17, 2010, more than a month after

he was arrested for the murder. Campbell's allegation that trial counsel was ineffective for failing to make contact with him in the week after his arrest is incorrect. § 27.51(1)(a) (2014), Florida Statues, states that the public defender shall represent any person who is determined by the court to be indigent, and who is under arrest for, or is charged with, a felony. The statue goes on to state, "the court may not appoint the public defender to represent, even on a temporary basis, any person who is not indigent." § 27.51 (2), *Fla. Stat*.

Here, Campbell was arrested on August 11, 2010. Campbell gave five statements to law enforcement between August 12, 2010, and August 16, 2010. According to the testimony at the evidentiary hearing, trial counsel, Mr. Lamberti, was not appointed to Campbell's case until August 17, 2010. Mr. Lamberti spoke with Campbell on that same day, and executed a notice of intent to invoke constitutional rights form. Mr. Lamberti spoke with Campbell again, three days later, on August 20, 2010.

Based on the aforementioned facts, trial counsel was not ineffective for failing to make contact with Campbell in the week preceding Campbell's arrest, because trial counsel was not appointed to represent Campbell until August 17, 2010. *See Everett v. State*, 54 So. 3d 464, 473 (Fla. 2010) (holding that trial counsel was not ineffective for failing to make contact with the defendant, because trial counsel had not yet been appointed to the defendant's case and therefore was not "representing"

the defendant and had no obligation to advise the defendant about his statements to law enforcement prior to appointment).

Additionally, Campbell's "rapid response" argument is unavailing. As stated by this Court in *Everett*, trial counsel is not ineffective for failing to make contact with a defendant, when trial counsel had not yet been appointed by the court to represent the defendant. Accordingly, as trial counsel was not yet appointed to represent Campbell, trial counsel had no obligation to advise Campbell about making statements to law enforcement, and thus Campbell's claim must be denied.

Appellant does not cite any law or statute to support the idea that there is some greater duty to provide counsel to a possible capital defendant before being appointed. The only authority at all mentioned are ABA guidelines, which are revealingly titled, "ABA Guidelines for the *Appointment* and Performance of Defense Counsel in Death Penalty Cases." (*IB* at 31) (emphasis added).

As emphasized by Justice Alito's concurring opinion in *Bobby v. Van Hook*, 558 U.S. 4 (2009):

> … the opinion in no way suggests that the American Bar Association's Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev. ed. 2003) (2003 Guidelines or ABA Guidelines) have special relevance in determining whether an attorney's performance meets the standard required by the Sixth Amendment. The ABA is a venerable organization with a history of service to the bar, but it is, after all, a private group with limited membership. The views of the association's members, not to mention the views of the members of the advisory committee that formulated the 2003 Guidelines, do not necessarily reflect the views of the American bar as a whole. It is the

> responsibility of the courts to determine the nature of the work that a defense attorney must do in a capital case in order to meet the obligations imposed by the Constitution, and I see no reason why the ABA Guidelines should be given a privileged position in making that determination.

Id., at 13-14.

Additionally, Appellant's own authority goes on to support the idea that this rapid response technique is predicated on first being appointed or hired by a defendant: "an interview of the client should be conducted within 24 hours of *initial counsel's* entry into the case"; "Promptly upon entry into the case, *initial counsel* should communicate in an appropriate manner with both the client and the government"; "Immediate contact with the client is necessary". *Id*. (emphasis added).

All these comments have a common theme and presumption, which is that prompt assistance and a rapid response occur after the attorney has been retained or appointed. A defendant is not a client until they are being represented, and an attorney is not someone's counsel until they are representing them. Until that attorney-client relationship is created, the members of the Public Defender's Office were merely lawyers who happened to be in the same county as Campbell, and Campbell was yet another criminal suspect. The Constitution does not afford some heightened duty of counsel to defendants whose crimes happen to make the news.

Based on Tebrugge's testimony, he was going to further testify that a rapid response is required in capital cases, which had already been covered by the two previous attorneys who testified, making his testimony cumulative and unhelpful to the trier of fact. The only addition would have been his purported expert opinion that trial counsel was ineffective for not providing this response before being appointed. The record reflects that Appellant intended to provide this opinion only as to claim 1 in their 3.851 motion, which alleged a failure to provide prompt assistance. Tebrugge was not expected to provide an expert opinion as to any other alleged deficiencies in trial counsel's representation.

As such, his testimony did not meet the minimal relevancy standard of Florida's evidence code. Relevant evidence is any evidence tending to prove or disprove a material fact. § 90.402. *Fla. Stat*. (1976) Tebrugge's expert testimony was only going to cover an opinion as to trial counsel's actions before they were ever appointed. Because he was going to give an opinion on effective assistance for a point in time prior to trial counsel being appointed, his opinion would be addressing a time before they ever had a duty to Campbell. An attorney cannot be ineffective to a non-client, and so any testimony to their effectiveness before August 17, 2010, is completely irrelevant.

Furthermore, Appellant cannot show that even if counsel had met with him prior to his arrest that the result of his trial and sentencing proceedings would have

been different. Appellant's attempts to establish prejudice are based on pure speculation about what would have happened had counsel met with Appellant. Also, as has been argued above, Appellant was not prejudiced by the statements trial counsel hypothetically could have prevented because the statements were in line with the chosen trial strategy. Therefore, Appellant has failed to establish the prejudice prong.

ISSUE III: THE POSTCONVICTION COURT PROPERLY FOUND THAT TRIAL COUNSEL DID NOT HAVE A BASIS TO OBJECT OR MOVE FOR MISTRIAL ON ALLEGED IMPROPER COMMENTS BY THE STATE

Appellant challenged two comments made by the prosecutor during the guilt phase of the trial. The first came during closing arguments, when the prosecutor stated:

> It's been proven that the witness was convicted of a felony. Well, we know the defendant is not a one-time convicted felon or a four-time convicted felon, he's a seven-time convicted felon. But he was stressed and he was depressed, he was in a fog, he was in a daze, he was in shock, it didn't register, he couldn't piece it together. If you want to believe that, go right ahead. I can't stop you. Let him walk out the back of that courtroom door.

(DAR, V18, R617-18).

Trial counsel did not object to this comment. Appellant alleged that the comment improperly shifted the burden to the defense, and trial counsel was ineffective for not objecting to it. The second comment was one made during Campbell's testimony, when the prosecutor whispered to co-counsel, "What a

manipulative ass." This comment was objected to and trial counsel moved for a mistrial at a sidebar, which was denied. Appellant is claiming ineffective assistant because defense counsel did not request an individual inquiry into each juror to see if they had heard the comment. The postconviction court found that the first comment was not objectionable and that there was no basis to seek juror interviews because there was no evidence to show the jurors heard the statement.

Campbell alleges that trial counsel was ineffective for failing to object to the prosecutor's closing remarks about allowing Campbell to "walk out the back door," because the remarks constituted burden-shifting. However, Campbell is incorrect. The prosecutor's remarks did not shift the burden of proof, they merely told the jury to weigh Campbell's testimony against the evidence, and to acquit Campbell if it believed his testimony.

To determine whether a prosecutor has engaged in improper argument, it is necessary to evaluate the actions of the prosecutor in context rather than focus on the challenged statement in isolation. *State v. Jones*, 867 So. 2d 398, 400 (Fla. 2004). This Court has explained burden shifting occurs where a prosecutor makes statements that "invite the jury to convict the defendant for some reason other than that the State has proved its case beyond a reasonable doubt." *Scott v. State*, 66 So. 3d 923, 930 (Fla. 2011) (citations omitted).

Applying the aforementioned legal authorities Campbell's argument that the trial counsel should have objected to the prosecutor's remarks is entirely meritless. The remarks by the prosecutor did not shift the burden of proof. The remarks did not call on the jury to convict Campbell based on anything other than the evidence produced at trial. Instead, the prosecutor merely argued to that if the jury believed Campbell's version of events, then it should acquit him. This is obvious when looking at the comments in more context:

> You know, the Court is going to tell you and give you some guidance in evaluating the evidence in this case, the witnesses' testimony in the case, and that the defendant is to be treated just like any other witness in the case. Some of the guideline is does the witness' testimony agree with other evidence and the other testimony in the case?
>
> It's been proven that the witness was convicted of a felony. Well, we know that defendant is not a one-time convicted felon or a four-time convicted felon, he's a seven-time convicted felon. But he was stressed and he was depressed, he was in a fog, he was in a daze, he was in shock, it didn't register, he couldn't piece it together.
>
> If you want to believe that, go right ahead. I can't stop you. Let him walk out the back of that courtroom door. I submit to you that flies in the face of the other evidence and other testimony with regard to this case.

(DAR, V18, R617-18).

Furthermore, there was no testimony to establish that Campbell was prejudiced in any manner by the prosecutor's remarks. The remarks were isolated and were only made in the context of arguing that the jury should weigh Campbell's testimony like any other witness, and properly arguing that it did not fit with other

evidence in the case. Thus, the prosecutor's remarks were proper closing remarks, and trial counsel was not ineffective for failing to object to the remarks.

Trial counsel testified he did not find the comment objectionable; and, regardless, he made the strategic decision to directly address it in his own closing argument. In his closing, trial counsel argued:

> As I said, he's not walking out of here. He knows he's not walking out of here. We're not asking you to let him walk out of here. We're not making excuses here. John really never made an excuse for anything. He knows what he did was wrong and he said that. He still struggles every day with what happened and he said that. John Henry Campbell did not deserve what happened to him and John acknowledged that.
>
> As I said, we're not making excuses and don't excuse – don't confuse what I'm saying with excuses because I'm sure Mr. Magrino is going to get up here and characterize our case as being full of excuses, but please do not confuse excuses with a meaningful and genuine attempt to explain John's state of mind because that element, state of mind, is essentially what separates first-degree premeditated murder from any of the lesser offenses that may flow from that charge.

(DAR, V18, R623-24).

The comment was not objectionable, and even if it was trial counsel made a reasonable strategic choice in addressing it directly instead of objecting. His rebuttal was in line with the defense's overall strategy of trying to get a second-degree murder conviction and win over jurors for the possible penalty phase.

Finally, even if trial counsel was ineffective for not objecting to this comment, Appellant has failed to show there is a reasonable probability that the outcome would have been different. This was a single, isolated comment, and was not so

inflammatory as to have warranted a mistrial, so any objection would not have affected the outcome of the trial.

Campbell also alleges that trial counsel was ineffective for failing to question the jurors regarding the prosecutor's "manipulative ass" remark. However, trial counsel's strategy for not conducting individual questioning was a reasonable strategy and thus Campbell's claim must be denied.

During Campbell's testimony at trial, the prosecutor remarked to co-counsel that Campbell was a "manipulative ass." Trial counsel heard the remark, requested a sidebar conference with the judge, and moved for a mistrial. The trial court denied the motion for mistrial. At the evidentiary hearing, trial counsel testified that he did not want to individually question the jurors because he did not want to draw attention to the offensive remarks or delay Appellant's testimony.

Campbell's contention that trial counsel should have individually questioned the jurors is meritless. The Florida Supreme Court has stated that a trial counsel's decision not to draw further attention to a comment can constitute reasonable trial strategy. *Johnson v. State*, 135 So. 3d 1002, 1017 (Fla. 2014). Because trial counsel's decision not to individually question the jurors was sound strategy, Campbell failed to prove that trial counsel was deficient. See *Cole v. State*, 841 So. 2d 409, 416-17 (Fla. 2003) (holding that declining a curative instruction regarding the State's

statement of "mankind at its worst" was not deficient because "the curative instruction would have had the effect of repeating the offensive comment.")

Furthermore, there was no evidence established that Campbell was prejudiced by the remarks in any manner. No evidence was adduced that any juror heard the remark, and it is likely any inquiry, even a vague one, would have only served to highlight the comment. Trial counsel mentioned during testimony that in addition to not wanting to highlight it, he was concerned about the delay it would cause while his client was up on the stand. Thus, Campbell has failed to show that trial counsel was deficient and that he suffered prejudice because of the alleged deficiency.

However, even assuming a juror, or the entire jury, had heard the remark, it would not have warranted a mistrial and does not justify reversal. When it comes to a prosecutor's comments, "the rule against inflammatory and abusive argument by a state's attorney is clear, each case must be considered upon its own merits and within the circumstances pertaining when the questionable statements are made." *Bush v. State*, 461 So. 2d 936, 941 (Fla. 1984), *holding modified on other grounds by State v. Evans*, 770 So. 2d 1174 (Fla. 2000). Such comments or arguments by a prosecutor only warrant reversal if they were so outrageous that they taint the finding of guilt or recommendation of death. *Crump v. State*, 622 So. 2d 963, 972 (Fla. 1993). Any error in prosecutorial comments is harmless, if there is no reasonable

possibility that those comments affected the verdict. *King v. State*, 623 So. 2d 486, 488 (Fla. 1993).

In *Crump*, the prosecutor made comments in closing argument comparing the defense to an octopus who was clouding the waters in an attempt to slither away, and asked twice for the jury to give a recommendation for death to send a message to the community. 622 So. 2d at 972. This Court found that these comments did not justify reversal. In *Darden v. State*, 329 So. 2d 287, 289 (Fla. 1976), after defense counsel said whoever committed the acts in that case was animal, the prosecutor repeatedly referred the defendant as an animal. The prosecutor also implied the defendant was a liar, saying, "Let me tell you something: If I am ever over in that chair over there, facing life or death, life imprisonment or death, I guarantee you I will lie until by teeth fall out," and "What does he have to lose to lie? Nothing. Nothing." *Id.* The court found that in the context of the heinous nature of the crimes committed, and that defense counsel was the first to use the animal characterization, these comments, including the ones calling the defendant a liar, were not improper. *Id*. at 290. In another case, the prosecutor argued to the jury that the defendant was a "dangerous, vicious, cold-blooded murderer," and warned them that neither the police or the judicial system could protect the public from people like him. *Esty v. State*, 642 So. 2d 1074, 1079 (Fla. 1994). Even these comments were not seen as so overly prejudicial as to vitiate the entire trial. *Id*.

Cases where the court did find error involved much more egregious or numerous remarks. *See Knight v. State*, 316 So. 2d 576 (Fla. 1st DCA 1975)(Defendant unduly prejudiced when prosecutor made comments throughout the trial and closing argument concerning the defendant's lack of support for his family, direct assaults on his morals, appeals of sympathy for the plight of the widow and the children of the deceased, and attempts to play on the jurors' geographic prejudice); *King v. State*, 623 So. 2d 486, 488 (Fla. 1993) (Prosecutor went too far when he gave a dissertation on evil which amounted to admonishing the jurors, "they would be cooperating with evil and would themselves be involved in evil just like" the defendant if they recommended life instead of death); *Taylor v. State*, 640 So. 2d 1127, 1134-35 (Fla.1st DCA 1994) (Prosecutor committed harmful error by trying to evoke an emotional response from the jury during closing arguments when he struck the table with the murder weapon and conjectured about the child victim's dying words).

What overly prejudicial remarks have in common is that they were so numerous as to take over the trial, or were individually completely over the line. For example, in *Taylor*, *supra*, while it was only one comment that was made, the prosecutor was striking a table with the murder weapon while talking about what a dying child may have said. 640 So. 2d at 1134-35. That remark was not just irrelevant, it was clear and blatant attempt to play to the jury's emotions, not an

argument on the facts. The comment made here was nowhere near as problematic. While it is improper to call a witness a liar, including the defendant, the prosecutor in *Darden* did exactly that in closing argument, multiple times, and those comments were ruled to be harmless error. 329 So. 2d at 289. Though the comment by the prosecutor in this case was somewhat more crass, it was a single remark. It was also said in a whisper to co-counsel and was not intended as an argument for the jury to rely upon.

The cases cited by Appellant are distinguishable. In *Gore v. State,* 719 So. 2d 1197 (Fla. 1998), the prosecutor repeatedly made personal attacks and the defendant's character while cross-examining him, and later in closing, and more importantly made to comments that clearly shifted the burden to the defense. *Id*., at 1200-1201. Twice, the prosecutor told the jury that if they didn't believe Gore, he was guilty. *Id*. at 1200. These comments urged the jury to convict for a reason other than the facts presented by the prosecution. In this case, while the remark made by the prosecutor was a comment on Appellant's credibility, he did not then follow it up by asking the jury to convict if they similarly did not believe his testimony. *Lewis* and *Donaldson* cited by defense involve the ban on presentation of character evidence when the defense has not made character an issue. *See Lewis v. State,* 377 So. 2d 691 (Fla. 1979); *Donaldson v. State*, 369 So. 2d 691 (Fla. 1st DCA 1979).

The trial judge properly denied a mistrial after this comment was made and direct appellate counsel properly did not challenge it on appeal as any challenge would have been meritless. While it did bring into question the Appellant's credibility, such an argument is one that is completely within allowable argument. A defendant's testimony is to be weighed and credibility given or not—just like with any other witness. The particular language used is not condoned, but the prosecutor was not telling the jury to convict if they found Appellant's testimony not credible. In fact, he was not telling the jury anything; rather, he was speaking softly to another attorney—and so even if a juror had heard it, the error is harmless.

If trial counsel was ineffective for not questioning the jurors about the comment, Appellant has still failed to establish any prejudice. The comment was not so erroneous or egregious as to justify a mistrial, and therefore even if trial counsel had questioned the jurors and found out they heard it, there is no reasonable probability the outcome would have been different. It was a single comment that was not repeated in any fashion to the jury, so it cannot be said that it affected the verdict.

ISSUE IV: THE POSTCONVICTION COURT CORRECTLY RULED THAT CUMULATIVE ERROR DID NOT DEPRIVE APPELLANT OF A FAIR TRIAL

Campbell alleges that the cumulative effect of all errors in his case deprived him of his right to a fundamentally fair trial. Campbell is not entitled to relief because each of his claims are individually meritless.

This Court has explained, that "[w]here multiple errors are found, even if deemed harmless individually, the cumulative effect of such errors may 'deny to defendant the fair and impartial trial that is the inalienable right of all litigants.'" *Hurst v. State*, 18 So. 3d 975, 1015 (Fla. 2009) (citations omitted). Also, "[w]here several errors are identified, the Court 'considers the cumulative effect of evidentiary errors and ineffective assistance claims together.'" *Id*. (Citations omitted). However, "where the alleged errors urged for consideration in a cumulative error analysis are individually 'either procedurally barred or without merit, the claim of cumulative error also necessarily fails.'" *Id*. (Citations omitted).

Here, all of Campbell's claims are either procedurally barred or without merit. Thus, Campbell is not entitled to relief. *See Lowe v. State*, 2 So. 3d 21, 33 (Fla. 2008) (holding that Lowe's individual claims were meritless, and thus his cumulative error argument necessarily failed).

CONCLUSION

WHEREFORE, Appellee respectfully requests that this Honorable Court affirm the lower court's order denying Appellant's motion for postconviction relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 27, 2018, a true and correct copy of the foregoing has been furnished by email to Mark S. Gruber, Assistant Capital Collateral Regional Counsel, Middle, 12973 N. Telecom Parkway, Temple Terrace,

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this response is 14-point Times New Roman, in compliance with Fla. R. App. P. 9.100(*l*).

Respectfully submitted,

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