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IN THE SUPREME COURT OF FLORIDA

MICHAEL SHANE BARGO, JR.,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. SC14-125

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTH JUDICIAL CIRCUIT,
IN AND FOR MARION COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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TABLE OF CONTENTS

PAGE#

CONTENTS

TABLE OF CITATIONS

Cases

Statutes

Rules

Other Authorities

PRELIMINARY STATEMENT

This case presents a direct appeal from the Circuit Court for Marion County, Florida, following the Appellant's conviction for first degree murder and sentence of death. This brief will refer to Appellant as such, Defendant, or by proper name, e.g., "Bargo." Appellee, the State of Florida, was the prosecution below; this brief will refer to Appellee as such, the prosecution, or the State.

Unless indicated otherwise, bold-typeface emphasis is supplied. Cases cited in the text of this brief are italicized. Other emphases are contained within the original quotations.

STATEMENT OF THE CASE

Michael Shane Bargo was charged by indictment with first-degree murder, along with Justin Soto, Kyle Hooper, Charlie Ely and Amber Wright, for the shooting death of Seath Jackson in Summerfield, Florida on April 17, 2011. (V30, R110).[1] Following various pre-trial proceedings, Bargo's trial began on August 12, 2013. (V29, R3). The jury found the Defendant guilty of Murder in the First Degree with a Firearm on August 20, 2013. (V40, R1440). The capital conviction proceeded to the penalty phase and on August 23, 2013, and the jury returned an advisory death sentence by a vote of ten to two (10 - 2). (V44, R450). The trial

[1] Cites to the record are by volume number, "V_" followed by "R_" for the page number.

court held a *Spencer*[2] hearing on November 13, 2013. (V46, R1). The trial court imposed a death sentence on December 13, 2013. (V47, R6). The Defendant filed a notice of appeal on January 10, 2014. The Appellant filed his *Initial Brief* on or about September 25, 2014. This answer follows.

STATEMENT OF THE FACTS

The State relies on the following facts from the evidence and testimony presented at trial.

Guilt Phase

On Sunday, April 17, 2011, Bargo's codefendant, Amber Wright, ("Wright") lured Seath Jackson ("Jackson") to the home of codefendant, Charlie Ely ("Ely"), so that Bargo, Kyle Hooper ("Hooper") and Justin Soto ("Soto") could ambush Jackson. When Jackson arrived, Bargo shot Jackson to death with Bargo's .22 caliber handgun. Jackson's killers then burned and dismembered Jackson's body, collected the majority[3] of Jackson's remains into paint buckets, and dumped the buckets into a pond located at a remote quarry in Ocala, Florida. Bargo planned Jackson's murder because of ongoing quarrels Bargo, Hooper, and Wright had with Jackson.

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

[3] Some of Jackson's remains were also found in Ely's fire pit.

Background

The quarrels between the parties stemmed from Jackson's involvement in two love triangles. Wright and Jackson began dating in December 2010 and according to Jackson's mother, Sonia Jackson, Jackson was very hurt when Wright broke up with Jackson in March 2010. (V32, R489). Nevertheless, Wright and Jackson continued to text and see each other in their neighborhood after their breakup. *Id.* Though Bargo denied such at trial, the State presented compelling evidence that Bargo and Wright became romantically involved around the time Wright broke up with Jackson.[4] Jackson maintained an interest in pursuing a romantic relationship with Wright, which led to confrontations between Jackson and Bargo. During one such confrontation, occurring seven (7) days before the murder, Sonia Jackson heard Bargo tell Jackson that Bargo had a bullet with Jackson's "name on it." (V32, R492).

Hooper, Wright's half brother, was initially friends with Jackson, but his relationship with Jackson soured when Wright broke up with Jackson. (V32, R492-

[4] Sonia Jackson witnessed Bargo and Wright kissing and holding hands in front of Wright's house two weeks before Jackson's murder. (V32, R491). Meghan Albany testified Bargo cheated on her teenage cousin, Tessa McLamb, with Wright and testified that Bargo and Wright have tattoos of each other's initials. (V33, R535-6). The State submitted testimony and photos establishing that Bargo had Wright's initials "AEW" tattooed on his left thigh. (V37, R1140-1). William Samalot also testified that Jackson told him Wright cheated on Jackson with Bargo. (V33, R 566).

3). Though not developed factually during trial, various witnesses referred to claims that Jackson had abused or raped Wright while they were dating. (V33, R547). Tensions between Hooper and Jackson increased when Hooper witnessed Jackson in bed with Hooper's love interest, Alyssa Masters ("Masters"), approximately one week before Jackson's murder. (V39, R1352). After seeing Jackson in bed with Masters through Master's bedroom window, Hooper texted Masters saying he was going to kill Jackson. *Id*.

Ely began allowing several people to move in and out of her two bedroom home after her husband had been sentenced to jail. (V33, R524). At the time of the murder, Bargo, Hooper, Soto, and Ely were living at Ely's house and Wright was occasionally staying overnight. (V33, R527-37). Approximately five or six weeks before the murder, Bargo obtained a .22 caliber Heritage handgun as a trade for wages Michael Proctor owed Bargo. (V33, R517). Meghan Albany ("Albany"), who previously lived at Ely's house with her boyfriend Jeremy Randle ("Randle"), testified that Bargo either kept this gun on him or hidden. (V33, R537). Albany testified that Bargo would shoot his gun out the back window of Ely's bedroom at a tree and had threatened Albany with the gun during an argument Bargo had with Albany which prompted Albany and Randle to move out of Ely's house about a week before the murder. (V33, R537-8).

Michael Samalot ("Samalot"), Jackson's friend, testified that Bargo and

Jackson "basically wanted to get even with each other." (V33, R547). Samalot testified about an incident that occurred two weeks prior to Jackson's death. (V33, R548). Bargo and Hooper were on the phone with Jackson asking Jackson and Samalot to meet for a fight. *Id*. When Jackson and Samalot later approached Ely's house, they heard a gunshot coming from Ely's house and left the area. (V33, R549). Samalot did not see who shot the gun, but Hooper later testified that Bargo shot his .22 revolver in Jackson and Samalot's direction that day from Ely's window to "scare them a little bit off." (V39, R1356).

The Murder

Samalot and Jackson were visiting neighborhood friends on the evening of the murder when Samalot noticed Jackson texting and having a phone conversation with Wright. (V33, R551-2). Samalot told Jackson not to talk to Wright telling him, "It's just bad news." (V33, R553). Samalot and Jackson parted ways around 9:15 p.m. (V33, R554). Samalot testified that Jackson was still texting at that point and heading in the direction of Ely's house. (V33, R553, 556-7). The following day, Samalot searched the neighborhood for Jackson after discovering Jackson missing. (V33, R557-8). During his search, Samalot went to Ely's house but found nobody home. (V33, R558). Samalot looked around Ely's yard and saw "stuff in a fire pit scattered throughout the backyard" and wet tan paint on the ground in the side yard. (V33, R559).

Hooper also testified for the State. Hooper testified that Bargo developed a plan to kill Jackson during the afternoon hours of the day of the murder. (V39, R1338). Bargo's plan called for Wright to persuade Jackson to come to Ely's house while assuring Jackson that Bargo and Hooper would not be home. (V39, R1339). The State introduced photos of the text messages Wright exchanged with Jackson just prior to Jackson's murder, which read as follows:

> Wright to Jackson: Hey can yuu tlk? (Message 45/52 Sent 8:12 p.m.)
>
> Jackson to Wright: You sed you needed to talk (Message 56/70 Sent 8:37 p.m.)
>
> Wright to Jackson: Well I kinda need to tlk to yuu aboiut us working things out? (Message 44/52 Sent 8:46 p.m.)
>
> Jackson to Wright: What you mean (Message 55/70 Sent 8:47 p.m.)
>
> Jackson to Wright: What you mean (Message 54/70 Sent 8:47 p.m.)
>
> Wright to Jackson: Can yuu plz call me like now (Message 43/52 Sent 8:48 p.m.)
>
> Jackson to Wright: Yeah sher. (Message 53/70 Sent 8:49 p.m.)
>
> Wright to Jackson: Hey my friend Charlie is coming wit I'v been telling her everything between me and yuu and shes coming bc i need her to help through this. Is that okay? But don tell any body whats going on bc i wanna make sure we can work things out before anyone knows (Messages 42/52 and 41/52 combined - Sent time undeterminable from photo)
>
> Jackson to Wright: Amber if you have me jumpt I will never give you the time of day so if I git jumpt say goodby alrite (Message 52/70 Sent 8:56 p.m.)

> Wright to Jackson: I swear your not seath. I could never do that to yuu. I just want yuu and me back (Message 40/52 Sent time undeterminable)
>
> Jackson to Wright: Ok (Message 51/70 Sent 8:58 p.m.)
>
> Wright to Jackson: Im walking up the hill now. (Message 39/52 Sent 9:00 p.m.)
>
> Wright to Jackson: I am at the neighborhood road. Where are yuu? (Message 37/52 Sent 9:08 p.m.)
>
> Jackson to Wright: Srry I didint wunt will to here me but stay around the courner wher me and you fot just wait rite ther il be ther in a minit (Message 50/70 Sent time undeterminable)

(V5, R860-90).

Once Wright convinced Jackson to come to Ely's house, Bargo's plan called for Wright to text Bargo and Hooper to let them know when Jackson was down the road so they could "get ready." (V39, R1341). Bargo's plan then called for Soto to hit Jackson with a piece of wood when Jackson entered the house, then for Bargo and Hooper to jump on Jackson and for Bargo to shoot Jackson. (V39, R1340). However, Hooper testified that the murder did not occur exactly to Bargo's plan.

Wright did not send a warning text to Bargo, and when Jackson entered Ely's house, Soto "didn't do anything." *Id*. Bargo and Hooper were in Bargo's bedroom debating whether to kill Jackson when Jackson entered Ely's living room. (V39, R1341). From Bargo's bedroom, Hooper could see Jackson sitting in the chair in the living room and, after being pressured by Bargo, Hooper grabbed a piece of

wood, ran into the living room, and hit Jackson over the head with it. (V39, R1342). Bargo followed Hooper into the living room with his gun and started shooting Jackson. *Id.* Jackson ran toward the kitchen then made his way out the front door. *Id.* Soto ran after Jackson and tackled him in the front yard. *Id.* Bargo ran outside after Jackson, shot him one more time then called for Hooper's help. *Id.* Hooper ran outside and helped Bargo and Soto bring Jackson back into the house where they placed Jackson in a bathtub. (V39, R1343). Bargo's plan called for Jackson to "still be alive" when he was placed into the bathtub so Jackson would know who was killing him. (V39, R1345). Hooper and Soto then helped Wright and Ely clean blood evidence in the kitchen and living room while Bargo stayed in the bathroom with Jackson. (V39, R1343). While Hooper was cleaning, he heard more gunshots. *Id.* Hooper ran into the bathroom and saw that Bargo had shot Jackson a few more times and was hitting Jackson and yelling and cursing at Jackson. Hooper eventually convinced Bargo to stop because Hooper was concerned about neighbors. *Id.*

Hooper testified that Bargo and Soto placed Jackson's body in a sleeping bag then burned it in Ely's fire pit. (V39, R1359). Hooper claimed that he did not place Jackson's body in the fire, but did tend to the fire until about 2:30 a.m. Monday morning because Bargo and Wright had gone to bed. *Id.*, (V39, R1346). According to Hooper, Bargo planned to dispose of Jackson's charred remains the

next day at a rock quarry with the help of Soto and James Havens ("Havens"), Hooper's former stepdad. (V39, R1344-5). Bargo admitted during trial that he was the only person involved in Jackson's murder who knew about and could find the Ocala, Florida, rock quarry, which was located in a wooded area and somewhat inaccessible by car.[5] Bargo testified at trial to his involvement in dumping Jackson's remains at the quarry on Monday afternoon. (V38, R1262-66).

The Investigation

Law enforcement was already investigating Jackson's disappearance by the time Bargo, Soto, and Havens returned from the rock quarry Monday afternoon. (V38, R1266-7). Bargo learned about the investigation when Wright and Hooper's mother, Tracey Wright, called Havens and told Havens that the police were at her house looking for Jackson and asking to speak with Wright, Hooper, and Bargo. (V38, R1267). After speaking with Tracey Wright, Havens and Bargo picked up Hooper from work and told Hooper about the police investigation. (V38, R1268). Bargo asked Hooper for money so that Bargo could get out of town, then Havens dropped Hooper off at a convenience store near Tracey Wright's house and drove Bargo to an ex-girlfriend's (Kristen Williams') father's house in Starke, Florida, stopping along the way in Ocala so Bargo could visit with Kristen Williams

[5] Bargo had previously gone swimming at the quarry with an ex-girlfriend who lived about a mile from the quarry. (V34, R643).

("K.Williams"). (V38, R1268-9). Per Bargo's request, Hooper stopped by Bargo's father's ("Bargo, Sr.") house on his way from the convenience store and told Bargo, Sr. and Bargo's grandmother about the situation, then proceeded to Tracey Wright's house where Hooper answered a few questions from police as police searched the house. (V39, R1348-9).

Hooper, Wright, and Ely stayed overnight at Tracey Wright's house on Monday, the day after the murder. (V39, R1349). Tracey Wright testified that around this time, Hooper and Wright were very upset and crying. (V34, R710-11). Tuesday morning, Hooper told Tracey Wright about Jackson's murder and, after speaking with a member of the family in law enforcement, called the police. (V39, R1349-50). The police subsequently arrested and interviewed Hooper, Wright, Soto, and Ely and obtained search warrants for Ely's house, the Ocala quarry, and Bargo's bedroom at his grandmother's house. (V34, R737-8, 741).

Police found a Heritage gun box and a spent .22 caliber cartridge when searching Bargo's bedroom at his grandmother's house. (V34, R747-8). While searching Ely's yard, police found dried paint on the ground in the side yard, a rake with dried paint in the tines, drag marks in the dirt located in the back yard, a pressure washer on the front porch, and a dumpster and a fire pit in the back yard. (V34, R772-5). A search of the fire pit revealed possible projectiles and possible human remains which were referred to Forensic anthropological expert, Dr.

Michael Warren, for further investigation. (V34, R792-3).

Inside Ely's house, police found that the door to the bathtub was disconnected (V34, R779). Police also found a fully loaded .22 revolver and two containers of live ammunition in a floor vent located between the bathroom and the bedrooms. (V35, R885-91). In the front bedroom, crime scene investigators found a can containing twenty-eight (28) .22 caliber casings, a sock bag on the bed that contained seventy-two (72) .22 caliber casings and three (3) .22 caliber live rounds, and a few loose .22 casings and live rounds. (V34, R781-2). In the southwest bedroom in the back of the house, investigators found two (2) .22 caliber casings on the dresser and a black and white Tshirt on the bed. (V34, R.783). Investigators also found a .22 caliber ammunition box and another .22 casing in the bathroom. (V34, R789-90).

The initial search of the quarry revealed shoe impressions and circular bucket rings in the sand and dirt along the path leading to the pond. (V35, R822). Police agents also found a bucket with a plastic bag attached to it floating in the water. (V35, R829-30). Police agents documented scrape marks leading down toward the water in moss that covered the surface of a limerock wall. (V35, R 874). Dive teams arrived at the quarry the following day, and when the search resumed, police found a five gallon bucket lid on the rock wall along the water and two more five gallon buckets under water attached to cinder blocks by wires and cables. (V35,

R833, 835-37). Pieces of suspected charred human remains were found in the buckets, at the bottom of the body of water, and on the rock wall near the location where the bucket lid was found. (V35, R843-45.)

DNA testing established that it was 63,000 times more likely that the remains police found were from the biological child of Jackson's parents than a randomly chosen Caucasian individual from the U.S. population. (V37, R1092). Forensic anthropological expert, Dr. Michael Warren, also testified that the remains police found were those of a male between the ages of 13 and 18. (V39, R931, 937). Dr. Warren testified that he found a projectile in the remains embedded in the soft tissue next to three lumbar vertebra. (V36, R946). Maria Pagan, expert in firearms examination and identification with the Florida Department of Law Enforcement tested the projectile found in Jackson's remains and concluded that the projectile was a .22 caliber bullet which had the same class characteristics – 6 grooves with a right twist - as Bargo's .22 caliber handgun. (V35, R904). Due to the condition of the bullet at the time of testing, there was not enough of a degree of agreement or disagreement of individual characteristics of the striations to determine whether the spent bullet came specifically from Bargo's gun. (V35, R907). Ultimately, Bargo's gun could not be excluded as being the murder weapon. (V35, R908).

Medical examiner, Dr. Kyle Shaw, testified that he observed a pattern of bright dots consistent with a projectile or bullet impact in an x-ray of a skull fragment

found in Jackson's remains. (V36, R1004). This finding, combined with the projectile found near the lumbar vertebra, his review of the crime scene, law enforcement's investigation, and Dr. Warren's investigation, led Dr. Shaw to conclude that Jackson's cause of death was homicide by gunshot wound or wounds and blunt force trauma. (V36, R1004-5). Bargo's DNA was found in blood evidence located on a bracelet, a pair of jeans, and three Tshirts belonging to Bargo. (V36, R. 963-5, 1056). Crime scene investigators found blood evidence in the bathroom floor, kitchen floor, living room floor, bathroom wall, and kitchen ceiling of Ely's house. (V34, R785-7, 795-9).[6] DNA analyst Nicole Lee testified that she was unable to obtain any DNA evidence from the blood found on the bathroom floor or the kitchen floor, but found Ely's DNA in a mixture in the blood found on the bathroom wall, Hooper and Jackson's DNA in a mixture in the blood found on the living room floor, and Bargo's DNA in the blood found on the kitchen ceiling light fixture. (V36, R1058-60).

Law enforcement's investigation also discovered that Bargo confessed several times to shooting Jackson. When Bargo visited K.Williams in Ocala on his way to Starke, Bargo told K.Williams that he shot a kid. (V34, R649-50.). After Bargo arrived at James Williams Sr.'s house in Starke, Bargo told James Williams, Jr.

[6] Luminal testing was required to discover blood on the bathroom floor, living room floor and in the kitchen. (V34, R787).

that he shot a boy eight (8) times, busted the boy's kneecaps when he was in the bathtub, burned him, and put him in paint cans. (V37, R1099-1101). Bargo also told James Williams, Sr.'s girlfriend, Crystal Anderson, that he killed a guy who raped his roommate's little sister, explaining that they beat him inside the house, chased him when he ran outside, shot him and drug him back into the house, placed him in the bathtub, then Bargo shot him twice in the face to kill him. (V37, R1111-2). Bargo also told Crystal Anderson that they placed Jackson's body in a sleeping bag and burned it, but that the body did not burn all the way – teeth were still in his skull so Bargo "took pliers and pulled his teeth out one by one." (V37, R1113). Crystal Anderson and Joshua Padgett[7] also witnessed Bargo smash his cell phone and throw it into a fire after Bargo's father told Bargo on the phone that a SWAT team recently raided Bargo's father's house looking for Bargo. (V37, R1113-4, 1131). Just prior to law enforcement apprehension of Bargo at the Williams' residence, Bargo also confessed to James Williams, Sr. that he wasn't truthful about his reason for visiting and that he had actually shot and killed somebody who raped a friend. (V37, R1126).

Bargo made additional incriminating statements and confessions while in custody pending trial. Shortly after being arrested, Bargo confessed to a fellow

[7] Padgett also testified that Bargo said "he shot this guy and drug him in the house and shot him again and burned him and carried him to the woods." (V37, R1131).

inmate in his holding cell, William Fockler, that he killed a kid who raped his girlfriend and that he burned his face while trying to burn the body. (V36, R1015, 1016-7). Retired corrections officer, David Smith, also testified that he overheard Bargo telling another inmate that "[t]here were only two witnesses who saw me shoot him." (V37, R1137).

Bargo's Testimony

Bargo vacillated regarding his decision to testify at trial. (V38, R1174-5). Ultimately Bargo testified but, at the request of his attorney, Charles Halloman, ("Halloman") Bargo testified in the narrative. (V38, R1177). During his testimony, Bargo denied being at Ely's house when Jackson was murdered but admitted to being involved with the disposal of Jackson's remains at the rock quarry. (V38, R1262-6). Bargo claimed that he was walking to a former girlfriend's ("Taylor Strawn's") house at the time of Jackson's murder. (V38, R1240-4; V39, R1322-3). Bargo explained that he had been pummeled[8] by Hooper and Soto before Bargo left on his way to Taylor's house due to an argument Bargo had about Hooper's drug use and Bargo's belief that Hooper had stolen Bargo's gun. (V38, R1226-32, 1240). After the fight, Bargo claimed he showered, tended to his wounds, searched for his missing gun, drank several beers, then began walking to Taylor Strawn's

[8] Bargo testified he suffered a broken nose, lacerations, blackened eyes and a busted lip from being hit and kicked by Hooper. (V38, R1233-4).

("Strawn's") house at around 9:00 p.m. (V38, R1235-7).

Bargo never arrived at the Strawn residence on the night of Jackson's murder. Bargo testified that he remembered using his cell phone to light his way while walking along a dark road at 9:25 p.m. (V38, R1241-2). Bargo testified that his heavy drinking caused him to throw up as he approached the Kwik King convenience store around 11:30 p.m.[9] (V38, R1243). Bargo then decided to return to Ely's house explaining:

> She had school tomorrow. You know, she's got to be up at like 4 o'clock in the morning. You know, it's like 11:30. It's late. You know, there's no way I'm going to be able to get there before, you know, what, like 12 o'clock? And even if I do, I'm going to be smelling like puke and beer and cigarettes. You know, I'm trying to avoid all that.

(V38, R1244). Upon deciding to cancel his plans to visit Strawn, Bargo testified that he called Bargo, Sr., who gave him a ride back to Ely's house. (V38, R1244).

Bargo claimed that when he arrived back at Ely's house he found Soto standing by the door, Ely scrubbing the floor with bleach, and Amber sitting on the couch, drinking from a bottle of liquor, and crying. (V38, R1249). Bargo testified that he

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[9] Bargo explained that while he was allegedly walking the streets for two and a half hours - between 9 p.m. and 11:30 p.m. - he "made a few stops," testifying, "You know, when I found a street light, [I] rolled a couple of joints, smoked a couple of joints." (V38, R1243). Bargo also claimed that he overshot a road on his way and was walking slower than normal because of a knee injury he sustained while doing tricks on a bmx bike earlier that day. (V38, R1219, 1243)

went directly to his bedroom and was approached by Soto who told Bargo he had Bargo's gun but that Bargo needed to talk to Hooper before Soto could give it back to him. *Id.* Bargo claimed that he went into the backyard and found a huge fire in the fire pit and saw Hooper next to the fence talking to neighbors who were concerned about the size of the fire. (V38, R1249-50). Bargo testified that he and Ely joined Hooper's conversation with the neighbors and that Bargo agreed with the neighbor that the fire was too big and assured the neighbors that he would put a hose to the fire if it did not go down in next five minutes.[10] *Id*.

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[10] Ely's neighbor, Julie Cunningham ("Cunningham"), also testified about this encounter, but her testimony differed from Bargo's testimony. Cunningham testified that she followed her husband outside to investigate an orange glow radiating through the windows of their house. (V33 R613-4). Cunningham witnessed two males, one identified as Bargo and the other matching Hooper's description, and one female who Cunningham identified as Ely speaking with Cunningham's husband. (V33, R614-6, 622). Cunningham also saw a male and a female by the fire. (V33, R616). Cunningham described Ely as being very chatty; Ely invited the couple over and stating that her husband was in jail and that she was having friends over for a bonfire. (V33, R615). With regard to Hooper and Bargo, Cunningham testified, "The larger one was pacing and just kind of checking us out and the other one had his hands in his pockets. He was nervous as well. Just intent on what we were saying and what – you know, why we were there." *Id*. Cunningham described the fire as being quite large with flames that were "licking the limbs" of trees that were estimated at being eight to ten feet overhead. (V33, R614-8). Cunningham also testified that she and her husband went back inside after being assured the fire would be taken care of, but observed that the fire was accelerated after they went back inside, which prompted her husband to go outside again to address the fire. (V33, R619-20).

Bargo testified that he returned to his bedroom after discussing the fire with the neighbors and spoke with Hooper, who confessed to Bargo that he had killed Jackson. (V38, R1251). According to Bargo's testimony, Hooper told Bargo the following story:

> Hooper and Soto were doing drugs in the bathroom when they heard a noise coming from the living room. Hooper put Bargo's gun in his waistband and came out of the bathroom to find Jackson sitting in the living room. Hooper demanded that Jackson leave, but Jackson refused to leave until he spoke with Amber and mentioned something about Masters, which triggered a fight between Hooper and Jackson. During the fight, Jackson wound up on top of Hooper so Soto hit Jackson over the head with a stick. The stick broke into two pieces and Jackson rolled off of Hooper and got up with a stick. Hooper then pulled Bargo's gun out of his waistband and started shooting Jackson. Jackson ran out the front door but Soto followed him and tackled him in the front yard. Hooper followed and shot Jackson again, then Soto and Hooper carried Jackson back inside and placed Jackson on the kitchen floor. Blood was getting on the kitchen floor and somebody was freaking out so Jackson was moved to the bathtub. When Jackson was in the bathtub, Hooper heard a noise coming from Jackson so Hooper shot Jackson a couple more times in the head.

(V39, R1367-9)

Bargo testified that Jackson's body was already in the fire when Bargo arrived home. (V39, R1369). Bargo testified that he "freaked out" upon hearing Hooper's story and mentioned calling the cops but Hooper threatened to blame the murder on Bargo if Bargo called to cops stating, "you're going to help us or you're against us." (V38, R1253).

Bargo testified that he told Hooper that he could not help until he sobered up

and Bargo suggested that everyone sober up and figure things out in the morning. (V38, R1254). Bargo also testified that Soto told Bargo that Soto had grabbed Bargo's gun when Hooper was not around and threw it under the house.[11] (V38, R1255). Bargo testified that he told Soto to leave his gun there because Bargo thought Hooper would not be able to get to it from that location and Bargo was worried about Hooper turning the gun on him. (V38, R1255-6). Bargo and Wright then went to bed together in Bargo's bedroom.

Bargo testified that he woke up the next morning around 10:30 a.m. and found Wright, Ely, Soto and Hooper in the living room having a discussion. (V38, R1257). Hooper had to go to work, so Bargo, Wright and Hooper walked to Tracey Wright's' house. (V38, R1257-8). Tracey Wright drove Hooper to work and Bargo and Wright accompanied them for the drive. (V38, R.1258). When they returned, Wright and Bargo initially went into Tracey Wright's house but Wright "started cracking up around her mom" and was "on the verge of tears that whole day" so Bargo and Wright went back to Ely's house. (V38, R1259).

Bargo testified that he found Soto pressure washing the front steps when he and Wright returned to Ely's house. *Id.* Amber then texted James Havens ("Havens"), Wright and Hooper's former stepdad, and told Bargo that Havens was

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[11] Law enforcement found Bargo's gun under the house, which was a modular home, through a vent located inside the house. (V35, R885-91).

on his way. *Id.* Bargo called K.Williams. Bargo previously spent time with K.Williams at her father's house in Starke, Florida. (V38, R1259-60). Bargo told K.Williams he wanted to get out of Ely's house for a bit and sought and obtained permission for him to stay at K.Williams' father's house. (V38, R1260). Havens arrived at Ely's house and agreed to drive the codefendants to the quarry. (V38, R1260-1). Bargo testified, "I had James [Havens] back the truck up to the dumpster." Then Soto got into the dumpster and started handing out "grey buckets with lids on them, five gallon buckets to James Havens and he takes them and sets them in the back of the truck." (V38, R1261-2). "I grab a couple of cinder blocks and there's this red dog leash. We put that in the back of the truck." (V38, R1262).

Bargo, Soto, and Havens then drove to Hooper's workplace to get gas money from Hooper, then Bargo helped Havens navigate to the quarry. (V38, R1262-3). The roadway to the quarry was blocked by a mound which required the three men to proceed on foot. (V38, R 1263). Bargo carried a cinder block and the red dog leash, Havens carried a bucket and a cinder block and Soto carried two buckets. (V38, R1263-4). While walking a sugar sand road leading to the quarry, Bargo testified that the group had to stop to rest four times because of Bargo's injured knee.[12] (V38, R1265). When the group reached a fence, Bargo told Havens and

[12] Consistent with Bargo's testimony, the state introduced evidence of footprints

Soto that he could not get over the fence but advised them that the water in the quarry is deepest near the cliff face. Bargo testified "I've actually swam down and touched the bottom. It's – it's fairly deep." (V38, R1265). Bargo instructed Soto and Havens to "throw it over the cliff face." (V38, R1265). Soto and Havens climbed the fence, Bargo handed the buckets and the cinder blocks over to them, and Soto and Havens headed toward the water. (V38, R1266). Bargo testified that he heard splashes then Soto and Havens returned headed back to Ely's house.[13] *Id.* After deliberations, the jury found Bargo guilty of first degree murder with a firearm. (V40, R1440).

Penalty Phase

Neighbors and Friends

The Christianson Family

Tom, Faith, Todd, and Amanda Christianson, Bargo's former neighbors in Michigan testified via video. (V41, R32, 42, 58). The Christianson family testified that the Bargos were great neighbors and were a normal family. (V41, R38, 54).

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and bucket rings found in the sand on the path leading to the rock quarry. (V35, R822).

[13] Bargo's account differed from the testimony of Havens who testified that Havens carried cinder blocks from the truck to the fence and Bargo carried "a bucket or two." Havens also testified that Bargo and Soto climbed the fence and threw the buckets in the water while Havens stayed behind. (V34, R678-9)

The two families camped and fished together. (V41, R33, 38, 42, 58). Faith had good memories of the times spent with the Bargos. (V41, R44). She occasionally babysat for Bargo and his younger sister, Lauren. (V41, R42). Bargo loved to fish and was generally well behaved during outings other than when tempers would "flare a little." (V41, R44). Bargo and his sister would get spankings when they misbehaved. *Id*. There were times when Bargo's parents (Tracy Obrien "Tracy" and Michael Bargo, Sr. "Bargo, Sr.") would argue loudly enough for the neighbors to hear and the police were called to the Bargos house at times. (V41, R36, 46-9, 59).

Bargo appeared to have a great relationship with his mother as a child and Bargo, Sr. appeared to be stricter. (V41, R38-9). Tom recalled that Bargo Sr. drank a lot. (V41, R59). Tracy was "absolutely" a loving mother and never physically abused Bargo as a child. (V41, R54-5). Bargo was good with his pets and he loved his sister. (V41, R45-6). He was a typical inquisitive child who changed in his teenage years when things started to change between Bargo and Tracy. (V41, R55).

Bargo was diagnosed with ADD/ADHD in 2005—the same year the Bargos separated. (V41, R43). Faith recalled an incident when Bargo was about 15-years-old and was "mad and had gone ballistic in the house and he - - seemed to be uncontrollable." He was eventually arrested and sent to "boot camp." (V41, R47-

8, 50, 51). He lived with his mother after his release from boot camp but eventually ended up in a juvenile detention center. (V41, R51). Faith occasionally visited Tracy and the children at their new home which was a few blocks away. (V41, R53). Bargo "seemed to be okay" but "still bitter." (V41, R53). Faith noted that Bargo changed after the divorce but thought it was typical teenage behavior. (V41, R55). Tracy did not allow Bargo "to run amuck" which caused a lot of problems. (V41, R56). Faith did not recall Bargo ever having a head injury. *Id*.

Amanda occasionally babysat for the Bargo children. (V41, R95). Amanda found the Bargos to be a friendly, fun-loving, normal family. (V41, R99). Bargo was an active child—"clever at times." (V41, R96, 99). Amanda saw Tracy as being the disciplinarian. Bargo often did not accept discipline well. (V41, R97). Tracy and Bargo Sr. were loving parents who cared about their children. (V41, R99-100).

Sarah Jordan

Sarah Jordan met Bargo in school when she was 15 years old. (V41, R63). Jordan testified that Bargo "could always make me laugh, he was just our class clown." Bargo complained about his mom but "just usual teenage boy stuff..." (V41, R64). Bargo was sent to the alternative school due to fighting and eventually ended up in a Juvenile Detention Facility. Bargo was in a substance abuse program and on probation. (V41, R65).

Jordan testified that Bargo was bullied "a little bit" but he never let him bother him. Bargo was not a confrontational person. He laughed things off and did not react when someone said something to him. Jordan knew Bargo took medication for ADHD. (V41, R66). Bargo was easily distracted. (V41, R69). Jordan did not see Bargo argue with his mother, but his mother kept "tabs on him" and always wanted to know where he was. (V41, R67-8). Jordan got the impression Bargo wanted to live with his father because he was more lenient. (V41, R68). Bargo was rebellious at times, but nothing "out of the ordinary." (V41, R68).

Alicia Cox

Alicia Cox and Bargo were classmates at the alternative high school Bargo attended in Michigan. (V41, R90-1). Cox testified that Bargo had a good home life but did not get along with his mother. Cox stated Bargo and his mother argued a lot and Cox was aware of a physical altercation that occurred between Bargo and his mother. *Id*. Cox described Bargo as hyperactive and observed that he had a hard time focusing. Cox and Bargo never abused drugs when they were together but Bargo spoke about his abuse at an Alcoholics Anonymous meeting. (V41, R91-2). Bargo was picked on because he was small and had altercations with other students at the alternative school when challenged, but "nothing extreme." (V41, R92-3). Cox found Bargo to be a kind person and a "follower." (V41, R93). Cox kept in touch with Bargo after he moved to Florida. (V41, R94).

Defendant and Family Members

Lauren Bargo

Bargo's sister, Lauren Bargo, is seven years younger than Bargo. (V41, R71). Their parents separated when Lauren was six. Tracy disciplined Bargo a lot. Tracy was stricter than their father who is "a lot nicer and a lot more calm." Tracy yelled and screamed at Bargo, and threw a shoe at him once. Tracy also had mood swings and yelled and screamed throughout the house. (V41, R72). Lauren explained that their father talked to them about the difference between right and wrong but their mother yelled a lot and belittled them. (V41, R78-9).

Bargo acted "normal" with Lauren and was calm toward her most of the time. His medication for ADHD, however, made him drowsy and affected his appetite. Bargo was upset when his parents separated. Bargo wanted to live with Bargo, Sr., but Tracy would not allow it. Bargo got upset and sad when his parents argued. (V41, R73, 76). Bargo did "fine" in school and did not have problems. Lauren never saw Bargo get bullied. (V41, R74, 76). Lauren has a good relationship with her brother; Bargo was very protective of her. (V41, R75).

Mark Doolin

Mark Doolin and Tracy are engaged and have been living together for five years. (V41, R80). Bargo lived with Doolin and Tracy for a period of time in Michigan. Doolin and Bargo had a good relationship; they went fishing together

and Bargo "seemed like a normal teenager." Doolin could not recall whether Bargo was taking medication when he lived with them. (V41, R81).

Doolin testified that Tracy was not a harsh disciplinarian and that he never saw her yell at Bargo. Tracy yelled at Doolin over "stupid little arguments" but not in front of the children. Doolin testified that there were "no real bad confrontations" in their house, but Doolin also admitted that he previously told an investigator that Tracy had wild mood swings and that he might have described Tracy to an investigator as being a bitch. (V41, R82, 85-6). Doolin testified that Bargo and Tracy had disagreements about staying out late or going to certain places. Bargo was also required to do many chores. (V41, R82).

Virgie Waller

Virgie Waller, ("Waller") Bargo's grandmother, observed Bargo's interaction with his mother since the day Bargo was born. (V41, R161). Bargo and his parents lived with Waller for eight months while the Bargos were having a house built. Bargo's parents initially had a good relationship. (V41, R162, 167). When Bargo was about two-years-old, Tracy started to scream at Bargo and hit him. (V41, R162). Waller expressed concerns to Tracy about this but her behavior did not stop. At about ten years old, Waller witnessed Tracy beating Bargo—she "slap[ped] him in the face ... hit him in the back ... knuckle him in places where it wouldn't show." (V41, R163). Waller visited Bargo, Sr. once during his divorce

and saw Bargo return from spending the weekend with his mother with a handprint bruise on his rib cage. Bargo told his father, "that's where mom hit me." (V41, R164). Waller had to get between Bargo and Tracy once when Bargo was nine or ten because Tracy had Bargo on the couch and was hitting him in the back, shoulders and legs. (V41, R163).

Tracy started abusing alcohol during her bitter divorce. (V41, R168, 170). Waller went to Michigan and brought Bargo back to live with her when Bargo was 17-years-old. (V41, R167). Waller did not believe Bargo had substance abuse problems. (V41, R169). Waller did believe Bargo ever suffered any head injuries or psychological problems. (V41, R169).

Michael Bargo, Sr.

Although they have "had their moments," Bargo and his father are very close. (V42, R180). Bargo had a normal childhood. Bargo played sports and learned right from wrong. (V42, R193). Their family had problems but "nothing out of the ordinary." (V42, R198).

Bargo Sr. and Tracy had an acrimonious divorce that was precipitated by Bargo and Bargo Sr. accidentally discovering objectionable photos of Tracy in the trash bin of the family computer. (V42, R181, 186). Tracy initially left with Lauren leaving Bargo behind with Bargo, Sr. Tracy started abusing alcohol during the divorce proceedings. Bargo, Sr. drank in the past but testified that he stopped

drinking for about a year before he and Tracy separated. (V42, R182-3). Bargo started acting out and was eventually suspended and expelled from school. (V42, R183-4). Although Bargo and his parents went to counseling during the divorce proceedings, most of the sessions involved just Bargo, Sr. and Bargo. (V42, R185). Bargo's behavior changed at about age 13 when the divorce proceedings came to an end. Bargo wanted to live with his father during the divorce but Tracy would not allow it. Bargo was very angry and upset with Tracy. (V42, R187-93). Tracy yelled at Bargo and was physical with him. (V42, R187)

Bargo Sr. testified that he went to Ely's house around midnight on the night of the murder because Bargo called him and asked if he could bring him some cigarettes. (V42, R177-8, 190-1, 195). Bargo was not upset at all—he seemed normal. (V42, R195). Bargo Sr. saw no indication that Bargo was having any type of seizure stating, "I wouldn't even know what a seizure looked like." (V42, R196). Bargo Sr. observed a fire burning in the fire pit in Ely's backyard at the time. (V42, R178). Bargo Sr. did not stay long because he was annoyed with Bargo because he failed to show up to help Bargo, Sr. with yard work earlier that day. Bargo, Sr. gave Bargo some cigarettes then went home. (V42, R179).

Bargo told Bargo, Sr. that he did not want his mother to attend his trial. (V42, R192).

Tracy O'Brien

Tracy married Bargo Sr. when she was 18 years old. They were married for fifteen years. (V43, R243-4). Bargo Sr. abused alcohol daily—"It was a normal thing." He got angry when he was drinking and "would explode for no reason." He worked when he wanted to in his own pressure cleaning business. (V43, R244). He often came home after a night of drinking and "any little thing would set him off." Bargo, Sr. threw things and hit things when they got into arguments, but Bargo was usually sleeping at such times. (V43, R245-6).

Bargo was a normal little boy, active and playful. Tracy testified that she disciplined the children by putting them in timeout. Occasionally Tracy spanked Bargo. She recalled slapping him in the face one time when he was about 16 years old. (V43, R255-6). Tracy testified that she did not physically abuse Bargo, but she was the main disciplinarian. (V43, R257). Bargo thought Tracy was the mean parent and blamed Tracy for the divorce. (V43, R258).

Tracy testified that Bargo, Sr. acted more like Bargo's friend than his father. Bargo called Tracy crude names. (V43, R246-7). Bargo started to "explode and get mad" when he became a teenager. (V43, R248). During fourth grade, Bargo was diagnosed with ADD and prescribed medication. Bargo's parents fought over Bargo's meds because Bargo, Sr. did not want Bargo to take medication. Bargo, Sr. attempted to destroy Bargo's medication when he could. (V43, R248).

The Bargos attended counseling but it did not go well. Tracy testified that

Bargo, Sr. quit drinking when he was diagnosed with Lupus, but started abusing pain medications and continued to have anger issues. (V43, R249-50). At one point, Bargo went out of control and police took him away. (V43, R251-2). Bargo went to counseling, but ended up in boot camp. (V43, R252). Bargo had also been cutting himself prior to this incident. (V43, R262). Tracy had not seen Bargo for almost four years prior to Bargo's penalty phase hearing. (V43, R252).

Michael Bargo

Bargo's parents had a good relationship when he was young. At age eight, their relationship deteriorated. They argued and threw things and things got progressively worse until they eventually separated. (V42, R201-2). His sister Lauren handled it well because she was born around this time and "she really just thought it was kind of normal." (V42, R203).

Bargo did well in school until third grade when Tracy took Bargo to the doctor and said he was out of control. Bargo was medicated with Ritalin at the highest dosage and "everything went downhill after that." (V42, R203-4). Ritalin made Bargo feel awful. He lost his appetite, could not sleep, and was emotional. Bargo's father did not think Bargo had a problem and he would throw out Bargo's medication but Tracy would get more and make him take it. (V42, R204-5). Bargo got picked on in grade school. When Bargo told Tracy, she told him to tell the teacher, which got Bargo beat up again. Bargo Sr. told Bargo to "go kick his ass,"

which resulted in Bargo being suspended for fighting. (V42, R205-6). Bargo testified that he made friends easily but was kept "cooped up in the house my entire childhood." (V42, R213).

Bargo, Sr. had a drinking problem until he "quit cold turkey" when Bargo was twelve. (V42, R206). Tracy drank occasionally but that changed when Bargo was sent to boot camp and drug rehabilitation at age sixteen. When Bargo returned home, it was "a free-for-all." Bargo's mother and her boyfriend drank all the time. Bargo testified that "[i]t was pretty bad." (V42, R207). Bargo's father took a lot of pain medications. Bargo tried talking to his father about him showing signs of addiction, but Bargo, Sr. insisted he took prescription drugs for arthritis and other medical problems. (V42, R208).

Bargo "buckled down" after he went to boot camp. (V42, R208). Bargo testified that he did not have behavioral problems prior to that but his mother insisted he could not live with his father so "she just told them to just lock me up." (V42, R209). The boot camp had four levels but Bargo never completed the first level due to "authority issues, problems, fight with other[s]... I didn't conform." (V42, R210). Bargo did a lot of physical training at boot camp. "It's really just try[ing] to break you and build you back up. But they can't break you ... and that's why I never made it out of level one." (V42, R219).

Bargo was ordered to see a psychologist when he was in the juvenile justice

system in Michigan. The psychologist recommended Bargo to an in-patient program in a mental institution. (V42, R218). Bargo testified he was considered a danger to himself and others. (V42, R219). His mother, however, did not want him admitted so "they had me locked up." (V42, R218). Bargo was prescribed several medications including Adderall, Ritalin, Concerta, Strattera, Focalin, Lexapro, Trazadone, and Seroquel. Bargo was not taking medications at the time of the murder, but was smoking marijuana and drinking heavily. (V42, R210).

The night of the murder, Bargo sat in Bargo, Sr.'s car when Bargo, Sr. drove to Ely's house to give Bargo cigarettes. Bargo drank heavily that day - an 18-pack of Bud Light. (V42, R211). Bargo moved into Ely house because he was not allowed to drink and smoke marijuana at his grandmother's house. (V42, R211). It was a "free-for-all" at Ely's house—there was no keeping it together there, no one was in charge. There was a lot of drug use. Everyone sat around and did nothing. (V42, R212).

Bargo used to cut himself because he was depressed stating, "[i]t's just a release." He stopped cutting himself when he left the rehab center. He was doing well, "was clean ... sober ... head screwed on straight." But when he moved to Florida, he picked up right where he had left off in Michigan. (V42, R215-6). When Bargo moved into Ely's house, his drinking got really bad testifying "I wouldn't [be here] if I wasn't there." Bargo drank until he passed out. Bargo

testified, "I had a real problem." (V42, R216).

Defense Experts

Dr. Joseph Wu

Dr. Joseph Wu, M.D., is employed by the University of California, Irvine, College of Medicine, and works in the neurocognitive imaging field explained as "different types of brain scans." (V41, R111-2). Dr. Wu reviewed a PET scan, a type of brain image that reveals the functioning of the brain, which was conducted on Bargo in June of 2013. (V41, R117, 135). PET scans are used to determine if someone has had a traumatic brain injury, seizures, strokes, tumors, or diseases such as Parkinson's. PET scans do not give a specific diagnosis but provide some clues as to what might be abnormal in a brain and how the pattern in the brain stem might be reflect certain types of brain abnormalities. (V41, R117, 122-3). PET scans are typically used for a medical diagnosis such as clinical oncology or in diagnosing dementia—"those are the more common uses." It is possible to have "false positives" results with PET scans. (V41, R137-8). Dr. Wu found abnormal PET scan results in 49 of the 50 cases in which he has testified. (V41, R149).

In addition to reviewing Bargo's PET scan results, Dr. Wu reviewed Dr. Berland's notes, Bargo's medical records, psychiatric and psychological evaluations and reports, and jail health records. (V41, R123-4). Dr. Wu testified that the PET scan indicated Bargo's brain had hot spots—"areas that are

statistically significantly abnormal." (V41, R126, 143). In Dr. Wu's opinion, "... the chance of Mr. Bargo's brain being normal is less than one in ten thousand." (V41, R126). Further, in Dr. Wu's opinion, Bargo's brain "shows an abnormal ration of activity of functioning." (V41, R127). Dr. Wu testified that the PET scan results were consistent with a history of multiple injuries of the brain and consistent with the kind of symptoms that Bargo has manifested behaviorally and "that he's had a history of episodic mood disregulations ... problems with being depressed ..." (V41, R127).

Dr. Wu also testified that Bargo had a history of occasional hallucinations and paranoia which is "consistent with abnormality in the temporal lobe area. It's kind of an epilepsy." In Dr. Wu's opinion, these types of disorders are often "misdiagnosed as attention deficit disorder, oppositional defiant disorder, bipolar disorder ... " Dr. Wu opined Bargo was misdiagnosed as being a psychiatric patient rather than a neurologic patient. (V41, R128). Bargo's PET scan showed "an uncontrolled firing of the temporal lobe, which is a key center of the brain for regulation of aggression and emotion." (V41, R130). As a result, Bargo had "episodic periods" where he had difficulty in regulating his behavior and impulses which lasted between a few minutes to a few hours, although "it's not like [Bargo] would have one hundred percent loss of ability to regulate behavior." (V41, R140). Dr. Wu opined that Bargo's impulsive behavior could have resulted in a carefully

planned plot that lasted for hours or longer. (V41, R141-2).

Dr. Wu testified that Bargo does not have "motor seizures" but has "seizures of his mood." Dr Wu testified that persons with these types of seizures "may still do relatively okay" for the time period in between the seizures. (V41, R130). "But when it fires up, they act out in a way that looks psychiatric but is really neurologic." In Dr. Wu's opinion, Bargo was never properly diagnosed and did not receive proper medication or treatment. (V41, R130-1). Dr. Wu concluded that Bargo suffers from "a complex partial seizure spectrum disorder, a type of partial complex epilepsy seizure." (V41, R131). Traumatic head injuries and stress can cause or be attributed to this type of disorder. (V41, R132-3). In Dr. Wu's opinion, anti-convulsant medications like Depakote or Carbamazepine can help this disorder. (V41, R133-4).

Dr. Robert Berland

Dr. Robert Berland, psychologist, provides mental health services to the Department of Corrections. (V43, R265-6). He testified on behalf of the defense in support of mitigation in every capital case in which he has testified. (V43, R300).

Dr. Berland performed a mental health evaluation on Bargo. He administered the Minnesota Multiphasic Personality Inventory test[14] "MMPI-II" by reading the

[14] The MMPI-II consists of 567 true/false questions. Dr. Berland only asked Bargo

questions to him. Dr. Berland reviewed voluminous materials that included Bargo's social welfare records, health, school, and medical records. (V43, R270, 293). The MMPI indicated Bargo had "a lot of delusional paranoid thinking." (V43, R284). However, Bargo obtained a very high score on the "F" scale, the validity scale, and Dr. Berland conceded that most professionals would opine that this would invalidate the test. (V43, R296). Nonetheless, Dr. Berland opined that Bargo's MMPI results were valid. (V43, R271). Dr. Berland also opined that Bargo is not insane and does not have any intelligence issues. (V43, R288, 308).

Subsequent to his interview with Bargo's mother, Dr. Berland concluded that Bargo suffers from partial complex seizures, which are often misdiagnosed as mental illness. Bargo was prescribed Dilantin, an anti-seizure medication while he was in the Marion County jail. (V43, R279, 282). Bargo was also was prescribed Seroquel, an anti-psychotic medication, in jail. (V43, R282, 298). There were indications noted, however, that Bargo did not take the Seroquel. (V43, R298-9).

In Berland's opinion, Bargo suffers from a biological mental illness with a brain injury which enhanced the symptoms. (V43, R288). Bargo's periodic alcohol or drug abuse made his behavior worse. (V43, R289-90). Dr. Berland concluded that Bargo suffers "at most" from a schizoaffective disorder, but he did

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the first 370 questions which consists of the basic validity and clinical scales. (V43, R293). The test was administered in July of 2012. (V43, R307).

not make a specific diagnosis by reference to the Diagnosis and Statistical Manual of Mental Disorders "DSM." (V43, R290, 296). In Dr. Berland's opinion, Bargo's medical condition caused irrational thought at the time of the murder. (V43, R292).

Bargo did not report having any hallucinations or delusions on the day he was arrested, April 21, 2011. Bargo's cognition was normal and he did not report any suicide attempts. (V43, R308-9).

State Expert

Dr. Greg Prichard

Dr. Greg Prichard, psychologist, also evaluated Bargo. He reviewed a voluminous amount of material that included Bargo's school and medical records, records related to the crime, and the results from the MMPI-II administered by Dr. Berland. (V43, R324, 328-9, 351, 360). Prichard opined that Dr. Berland should have used the standardized method of administering the test. Dr. Berland should not have read the questions to Bargo. (V43, R362).

Dr. Prichard testified that the elevated "F" score/validity scale on the MMPI-II was an indication that the test was invalid. (V43, R334). In Prichard's opinion, Bargo was not psychotic, suffering from delusional thinking, or experiencing disorganized thinking at the time of the murder. (V43, R33-6). Bargo's numerous records indicated he was treated by medical professionals early in his life. Bargo had contact with many school officials "that are looking at him because he had

issues and because he has behavioral issues" to try to determine what was wrong with him. Dr. Prichard disagreed with Dr. Berland's diagnosis of "bipolar disorder rapid cycling" because Bargo was initially diagnosed with bipolar disorder in 2009—just two years prior to the murder. Bargo was diagnosed with ADD/ADHD at age seven or eight which are behavior issues and "not a psychosis." The medications prescribed to Bargo for this diagnosis, however, did not curb his conduct. Prichard's attributed Bargo's school troubles to behavioral issues — Bargo was not psychotic, experiencing delusions, or demonstrating disorganized thinking. (V43, R338-9). Bargo's medical records did not indicate any history of psychosis or history of delusions. (V43, R340). Psychological records from May of 2006 through June of 2007 indicated Bargo was diagnosed as "oppositional, defiant, acting out, not listening, problems with authority, blaming everyone else, not taking responsibility, not accountable for his behavior." As a result, Dr. Farmer (Bargo's former psychologist) recommended "inpatient treatment because of his inordinate rage and anger especially toward his mother." (V43, R341). However, there was no mention of schizoaffective disorder or any psychotic mental disorder. (V43, R342, 361). Bargo was diagnosed with "oppositional defiant disorder," which Dr. Prichard testified is a behavioral disorder, "not a psychotic mental illness." (V43, R343).

Bargo's history also included signs of antisocial personality traits. (V43,

R346). In Prichard's opinion, Bargo's behavior was characterological rather than a psychotic or neuro-chemically driven phenomena. (V43, R346). Dr. Prichard explained that certain drugs, such as Seroquel, fall under the umbrella of antipsychotic medication, but they are prescribed for other treatments, as well. In Dr. Prichard's experience, it is typically prescribed for sleep issues. Bargo's jail records indicated he was administered Seroquel in the evenings. (V43, R347, 369).

Dr. Prichard noted that Dr. Berland's diagnosis of partial complex seizures was not mentioned in any of Bargo's medical records. (V43, R348). In Dr. Prichard's experience, patients diagnosed with this disorder typically demonstrate relatively complex activity—"typically ... has a seizure ... fall on the ground ...shaking ... don't have any control." Dr. Prichard testified that people with a complex seizure disorder exhibit strange behaviors that last for moments or short periods of time. "It's not like days of complex behavior." (V43, R350-1).

In Dr. Prichard's opinion, there was no indication Bargo "has a psychotic process that generated his behavior" in relation to the murder. "This was not a disorganized crime. It is definitely not suggested that he was in the middle of a psychotic break." Dr. Prichard opined, Bargo is "psychopathic. Psychopathic[s] ... run the show, they do things their own way. They typically orchestrate crimes that pull other people involved. They're the head man ..." (V43, R351-2). Bargo "had a plan, sounds like the motive was just dislike for the individual, so he instructs

some of these players to do different things." In addition, mutilating the victim's body subsequent to the murder "tells you about the character of the individual..." (V43, R353). In Dr. Prichard's opinion, psychopathic individuals are the types of people who engage in mutilation because they do not have empathy "they do not contemplate that they're destroying lives the same way we do." In sum, Dr. Prichard opined that "all the planning, the instructing other people ... hiding the gun ... shoveling the remains of the body into buckets so that they can hide that - - this is not psychosis, this is character." (V43, R354).

Dr. Prichard also administered a psychopathic checklist to Bargo which yields the presence of a cluster of personality and behavioral characteristics. (V43, R355, 358). Dr. Prichard concluded that Bargo's history of not following rules, behavioral issues, opposition to authority, suspensions from school, disrespect to family, criminally-minded actions, Jackson's murder and subsequent mutilation, involving and instructing four other individuals, indicated Bargo is "very psychopathic in his personality orientation, it has nothing to do with psychosis, it has nothing to do with hallucinations, it has nothing to do with delusions. It's a personality makeup that's very dangerous." (V43, R355, 357-8).

***Spencer* Hearing**

The trial court held a *Spencer* Hearing on November 13, 2013. Prior to the

hearing, the trial judge met with counsel in camera and provided them a copy of a letter the judge received from Bargo on October 31, 2013. Other than noting the letter was from Bargo, the trial judge did not read the content of the letter. (V46, R5). Upon reviewing the letter, Holloman advised the court:

> We all know the purposes of why we're here today. We're not here to argue any sort of ineffective assistance claim. This complaint in this letter is that he was – that he gave testimony in the narrative form. Okay.
>
> And that I, secondly, am not permitted under the rules of professional conduct to argue his perjury, which simply is what it is, as a defense. And what he claims as a result of that is that basically I threw him under the bus. What we did was this: Based upon the available admissible evidence that was lawfully before the Court, even the Court ruled that my conduct beforehand – because we discussed this – we had a pretrial – off-the-record pretrial before and then we discussed it on the record several times.
>
> … Now what he wants to do this morning is he wants to get up there and engage in a diatribe of how he was thrown under the bus because of that and how certain witnesses were not called that could have proven his innocence.

Id. The trial court responded, "I found at the time that narrative testimony was the only way in which Mr. Bargo would be able to testify. I continue to make that finding. I am not going to go back and readdress that issue." (V46, R6).

The defense first called Jackson's father, Scott Jackson. Scott Jackson testified that he met Bargo on two occasions, both when he was called to address altercations that were occurring between Bargo and Jackson. (V46, R15, 19). Scott Jackson asked Bargo and Bargo, Sr. during these meetings if Bargo had a gun and

they both said no. (V46, R17, 20). Scott Jackson testified that Jackson likely "whooped" Bargo in the past. (V46, R20).

The defense also called Joey Desy who lived down the road from Bargo's grandmother's house. (V46, R25). Desy recalled an occasion in March or April 2011 when he called the police because he saw Bargo being threatened by people in the street. (V46, R26-7). Desy testified that Bargo retreated into his grandmother's house when he was being threatened. (V46, R27). Desy testified that Bargo also worked for him in the past and that he found him to be respectful, reliable and dependable. (V46, R28).

The defense next called Wright's mother, Tracey Wright. Tracey Wright testified that Bargo and Wright were good friends but that she was not aware of their relationship being anything more than friends.[15] (V46, R30). When Wright broke up with Jackson, people posted things on Facebook that made Bargo mad and Wright upset - Wright was "crying a lot." (V46, R32). Tracey Wright believed Bargo "was always in fights" because she saw him with injuries, but she never saw Bargo fighting. (V46, R34). Tracey Wright testified that Bargo was present when she called police about threats she read on Facebook to burn down her house and beat up her ex-husband. Tracey's ex husband also called the Jackson family about

[15] Tracy Wright did not know Wright had tattooed Bargo's initials on her groin area until after Bargo was arrested for Jackson's murder. (V46, R34).

the threats. Tracey Wright heard Bargo get threatened when the police and the Jacksons were at her house discussing the Facebook threats. (V46, R35-6). Bargo was respectful around Tracey Wright. (V46, R36). Tracey Wright observed Bargo and Hooper get angry and upset at times when Wright would come home with bruises and cigarette burns. *Id*.

The defense next called William Samalot. Samalot testified that he knew Bargo for a few years and they were "decent friends." (V46, R39). Samalot witnessed Bargo and Jackson antagonize each other and fight in March and April of 2011. Samalot testified that Jackson was a lot taller than Bargo and a more experienced fighter. (V46, R43). Samalot heard a few people call Bargo "princess." (V46, R48).

Duane Hooper, Kyle Hooper's father, next testified that he has known Bargo for about six years or eight years. (V46, R60). Bargo spent a lot of time at his home and Duane taught Bargo tattooing. (V46, R61). Bargo was always respectful to Duane. *Id.* Duane treated Bargo like one of his own kids. (V46, R62). However, in the spring of 2011, Duane became uncomfortable around Bargo and didn't want him around his kids, which created issues with his kids. (V46, R63). Bargo never threatened Duane but after Bargo's arrest, Duane learned from the State that Duane was on a list to be killed. (V46, R66).

The defense next attempted to introduce evidence through witness Rhonda

Stroup that Bargo's codefendants were overheard discussing their intention to blame everything on Bargo when they were being held in an interview room at the Marion County Sheriff's Office, but the trial court excluded this testimony, sustaining the State's relevancy objection. (V46, R75-6). The defense next called self-employed forensic psychologist Dr. Eric Mings, who evaluated Bargo on October 23, 2011. (V46, R82). Mings conducted a clinical interview and a variety of neuropsychological tests including a WAIS-IV IQ test. (V46, R82-3). Mings found Bargo's full scale IQ score to be 105, which is in the average range, and found Bargo's neuropsychological functioning to be average. (V46, R84). Mings also explained different stages of development of the preadolescent and adolescent brain. (V46, R85-6). Mings explained that there is a period of time which goes into twenties (20's) where a person's brain is not fully developed, particularly the frontal lobes, which are responsible for controlling our behavior. (V46, R86-7). The age of 18, recognized at as legal adulthood, is in the middle of the latter range of brain development. (V46, R87). This is the age where people tend to engage in impulsive, risky behaviors. *Id*. Mings also testified that people are very susceptible to peer influence at this age. (V46, R88). Mings testified that many serious psychological illnesses become most evident in late adolescence to early adulthood, though it is unknown as to why this occurs. (V46, R97).

Dr. Berland was the defense's final witness. Berland testified that Bargo should

be considered an adolescent, for purpose of brain development, at the time of the murder. (V46, R111). Berland explained that until age 25, the adolescent brain is different than an adult brain. *Id*. From age 13 until 25, neural connections that are not used regularly are pruned out while connections that are regularly used become more efficient due to accumulations of fatty tissue called myelin, the myelin sheath. (V46, R112). The adult brain relies mostly on the frontal lobes for executive functions while the adolescent brain relies on the amygdala, the more primitive part of the brain that responds to peers more and anticipation of rewards. Dr. Berland's testing however did not find any behavior manifestations, immaturity or lack of impulse control in Bargo. (V46, R116). Berland testified that Dr. Wu noted an increase in temporal lobe activation. When asked if this resulted in poorer impulse control, Berland responded, "Yes. Well, I think so, with the temporal lobe epilepsy, correct." (V46, R118-9).

Bargo opted to present allocution but utilized this opportunity to profess his innocence and claim that he did not agree with trial counsel's decision to argue for a second degree murder conviction during trial. (V46, R132). Bargo told the trial court he never had a chance to present his evidence and identified witnesses he wanted to call to prove his innocence, though several of the witnesses he named testified during the guilt phase that they heard Bargo confess to Jackson's murder. (V46, R132-3). The court attempted to keep Bargo focused on the purpose of

allocution as follows:

> THE COURT: Mr. Bargo please listen carefully to me. You will have the right to take an appeal of the verdict of the jury and the judgment and sentence of the Court. That is for a later time, the appeal that is.
>
> MR. BARGO, JR.: Your Honor, I don't know what to do. I never got a chance to put this on record. I tried talking to you last time when we did closing arguments. I never got a chance to even talk to you.
>
> THE COURT: This is your opportunity to address me in regards to what sentence should be imposed.
>
> MR. BARGO, JR.: I mean, Your Honor, I really – I don't know. I mean I think it is terrible what happened….But I didn't do this, I know I didn't do this.
>
> I shouldn't get the death penalty. I shouldn't get a life sentence. But I can't make that judgment. I didn't get a chance to even prove my innocence. I guess I can't really even argue what I should get. I never got a chance to prove I was innocent. I never got the chance to argue this.
>
> THE COURT: This is your right to make a statement in regards as to what sentence should be imposed.
>
> MR. BARGO, JR.: I don't know. You want me to ask for life in prison for something I didn't do?
>
> MR. HOLLOMAN: May I, Judge? If I could lead him with a question?
>
> THE COURT: Yes, sir.
>
> MR. HOLLOMAN: There are two choices here, basically. Regular or extra crispy so to speak. It's either life without the eligibility for parole or death by lethal injection. Now, this has been explained to you. It's logical for you to argue for life, unless you want to be a death volunteer.

> And I would assume that's not the case. Because if you plan on appealing, I would think you would want to be alive for that appeal. What I would suggest to you is to talk about some of these other things we talked about that would mitigate to a life sentence.
>
> Because you wanted the right of allocution and you have got it. Okay. Just take a deep breath.
>
> Maybe it would be appropriate to give him a minute and let him collect his thoughts?
>
> THE COURT: Mr. Bargo?
>
> MR. BARGO, JR.: Your Honor, I don't want to die. Obviously nobody wants to. I mean, but I'm not going to ask you for a life sentence either. I'm not. Not for something I know I didn't do. And I don't want to die. I really don't. I was 18 years old then.
>
> THE COURT: That will conclude the *Spencer* hearing for this afternoon…..

(V46, R135-8).

Sentencing and Trial Court Findings

The trial court held a sentencing hearing on December 13, 2013, to announce its findings and sentence as to the murder conviction. The defendant did not make a statement at this hearing.

Aggravation

The trial court found the following aggravating circumstances and supported each with findings of fact in the trial court's sentencing order. (SeeV16, R3117-37).

1. The capital felony was especially heinous, atrocious, or cruel pursuant to Section 921.141(5)(h) of the Florida Statutes. (Great Weight).

    a. The actions of the Defendant were conscienceless and exemplified an extreme desire to inflict a high degree of pain, fear and terror in the victim.

    b. The fear, emotional strain, and terror experienced by the victim while he attempted to escape, was shot, and brought back inside the house to his death support the heinous, atrocious and cruel aggravator.

2. The capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification pursuant to Section 921.141(5)(i) of the Florida Statutes. (Great Weight).

    a. The Defendant, upon calm and cool reflection, carefully concocted a plan to murder the victim and dispose of his body.

    b. The Defendant meticulously planned the murder by assigning specific roles to each of his codefendants and then committed the murder according to the complex and ruthless plan.

    c. The Defendants actions were not only calm and careful, but they exhibited a degree of deliberate ruthlessness, as shown by the Defendant's stated desire to ultimately kill the victim face-to-face to ensure the victim knew the Defendant was the one who killed him.

    d. The evidence fails to establish an excuse, justification, or defense to the murder.

Statutory Mitigation

The trial court made the following findings regarding the following statutory-mitigating-circumstances:

1. The capital felony was committed while Bargo was under the influence of extreme mental or emotional disturbance pursuant to Section 921.141(6)(b) of the Florida Statutes. (Slight Weight).

    a. The court finds that there is some evidence that the Defendant was under extreme mental or emotional disturbance at the time of the

murder.

b. Dr. Berland diagnosed Defendant as having a biological mental illness and has a schizoaffective disorder. Dr. Wu opined that Defendant's partial complex seizure disorder affected Defendant's ability to regulate his behavior and impulses.

2. The capacity of Bargo to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. (Found to be unproven)

a. The court finds there is no evidence to support that the capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired.

b. Dr. Berland testified that he was not saying that the Defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired. Dr. Wu explained that, although a person suffering from a partial complex seizure may have difficulty regulating his behavior and emotions, the person would not lose total control of his behavior.

3. The age of Bargo at the time of the killing. (Slight Weight)

a. The defendant was born April 29, 1992, making him 18 years and 354 days old at the time of the murder.

b. While the defendant was chronologically young, testimony established that the Defendant was a fully functioning adult at the time of the killing. Dr. Mings also testified that he found the Defendant to be of average intelligence and that Defendant scored in the normal range on almost every test that was administered to him.

Non-Statutory Mitigation

The trial court made the following findings regarding non-statutory mitigation:

1. Bargo did not act alone in the killing of Seath Jackson and Bargo was equally

culpable as his co-defendants in the killing. The court found no evidence to support this mitigator.

2. Bargo was less or equally culpable than the codefendants in the killing. The Court found no evidence to support this mitigator.

3. The capital felony was committed while Bargo was under the influence of a mental or emotional disturbance. (Slight Weight).

4. The capacity of Bargo to appreciate the criminality of his conduct or to conform his conduct to the requirement of the law was impaired. The Court found no evidence to support this mitigator.

5. Bargo was abandoned by his father and left in the care of his mother. (Little Weight).

6. Bargo had a hostile relationship with his mother that led him to being placed in a boot camp program while living in Michigan. (Little Weight).

7. Bargo was diagnosed with ADHD/ADD. (Little Weight).

8. Bargo was found to be a danger to himself and others because of his anger problems caused by his parents divorce. (Little Weight).

9. Bargo was treated for self-sabotaging behavior as a result of his parents acrimonious divorce. (Little Weight).

10. Hostility between Bargo's mother and father negatively impacted Bargo. (Little Weight).

11. Bargo was subjected to harassment and teasing during his adolescent years because of his small stature. (Little Weight).

12. Bargo was bullied in school while living in Michigan. (Little Weight).

13. Bargo was encouraged to fight back when he was bullied. (Little Weight).

14. Justin Soto participated in the killing of Seath Jackson. (Moderate Weight).

15. Kyle Hooper participated in the killing of Seath Jackson. (Moderate Weight).

16. Amber Wright participated in the killing of Seath Jackson. (Moderate Weight).

17. Charlie Ely participated in the killing of Seath Jackson. (Slight Weight).

18. Bargo was diagnosed with an abnormal brain scan. Given the small control group utilized in making this determination, the Court afforded this mitigator slight weight.

19. Bargo was diagnosed with bipolar disorder. (Moderate Weight).

20. Bargo is a loving brother who had a close relationship with his sister. (Slight Weight).

21. The capacity of Bargo to appreciate the criminality of his conduct or to conform his conduct to the requirement of the law was impaired. The Court did not accept this mitigating circumstance.

22. Bargo suffered from bipolar disorder. (Moderate Weight).

23. Bargo suffers from schizoaffective disorder. (Moderate Weight).

24. Bargo suffers from partial complex seizure disorder. (Slight Weight).

25. Bargo was prescribed Ritalin, Concerta, Focolin, and Adderal for his ADHD diagnosis. (Little Weight).

26. Bargo was prescribed Seroqual, Stratera, and Respiradol for his Bipolar Disorder. (Little Weight).

27. Bargo suffered from severe drug addiction and received treatment. (Little Weight).

28. Bargo completed his high school education by obtaining his GED from the Community Technical & Adult Education Center in Ocala, Florida. (Little Weight).

29. Bargo had a loving relationship with his paternal grandmother. (Slight Weight).

30. Bargo had a loving relationship with his father. (Slight Weight).

31. Bargo's father motivated him to disobey and disrespect his mother. (Little Weight).

32. Bargo is artistic like his mother, who is a graphic designer. (Little Weight).

33. Bargo suffers from paranoid delusional thinking as a result of his psychological and neurological illnesses. (Slight Weight).

34. Bargo suffers from hallucinations as a result of his psychological and neurological illnesses. (Slight Weight).

35. Bargo maintained his behavior during trial. (Little Weight).

36. Bargo was abandoned by his father when his father moved to Florida and stopped paying child support. (Little Weight)

37. Bargo was encouraged by his father to misbehave and act out. (Little Weight).

38. Bargo engaged in cutting himself. (Little Weight).

39. Bargo completed probation in Michigan. (Little Weight).

40. Bargo loved and cared for his dog, Lady, and brought her with him when he moved to Florida. (Slight Weight).

41. Bargo came from a dysfunctional family. (Little Weight).

42. Bargo is immature. The Court found there was no evidence to support this mitigator.

43. Bargo is a danger to himself and others and should have been committed to a mental hospital as recommended by Dr. Farmer. (Slight Weight).

44. Bargo discontinued taking his medication because of his father. (Little Weight).

45. Bargo was not taking his medication at the time of the killing of Seath Jackson. (Little Weight).

46. Bargo could not be disciplined as a normal child. (Little Weight).

47. Bargo's mental illness, either neurological or psychological, interfered with his ability to behave in school or at home. (Little Weight).

48. Bargo's mental illness, either neurological or psychological, interfered with his ability to control his conduct in society. (Slight Weight).

49. Bargo's parents sabotaged him with their negative, hurtful conduct. (Little Weight).

50. Bargo sought employment to make money to become self-sufficient. (Little Weight).

51. Bargo suffered side effects from his medication that caused lack of hunger, headaches, grogginess, inability to concentrate, and fatigue. (Little Weight).

52. The Department of corrections has facilities to care for mentally ill patients. (Little Weight).

53. Bargo's paternal grandfather committed suicide. (Little Weight).

54. Bargo's paternal grandfather had been committed to a mental hospital. (Little Weight).

55. Bargo's adolescent brain development was impacted by his mental health and the adolescent brain operates on a more immature level than a mature brain, as evidenced by a lack of impulse control, lack of ability to handle stressors, and high emotional level. (Slight Weight).

The trial court concluded that the aggravating circumstance in this case greatly outweighed the mitigating circumstances. The Court emphasized that the aggravating circumstances, when considered alone, would justify the imposition of the death penalty and concluded, "[w]ith the aggravating circumstances considered together, and there being no mitigating circumstances afforded any substantial

weight, the death penalty is not only justified, it is the only appropriate sentence based on the evidence and the law of the State of Florida." (V16, R3136)

SUMMARY OF ARGUMENT

Claim I. Bargo fails to meet the heightened standard of review he faces while claiming on direct appeal that he received ineffective assistance of counsel during trial. The record clearly indicates that Bargo's counsel was placed in a dilemma when Bargo made his last minute decision to testify, apparently falsely, at the guilt phase of trial. The record also shows that Bargo's false testimony limited counsel's trial strategy, but is completely silent as to how and why. Factual development in the postconviction trial court is required in order to ascertain a fair and just adjudication of Bargo's ineffective assistance of counsel claims. Furthermore, when scrutinized, counsel's alleged errors, if errors at all, did not prejudice Bargo under the facts and circumstances of his case. Bargo's ineffective assistance of counsel claims should be denied.

Claim II. The evidence submitted was clearly sufficient to support Bargo's capital murder conviction. Bargo's testimony verified all of the State's evidence submitted to prove that Jackson was killed by Bargo's gun at the house in which Bargo was living, that Jackson's body was burned in the house's fire pit, and that Bargo, Soto, and Havens dumped Jackson's charred remains in quarry that was known only to Bargo, and that Bargo fled from law enforcement to Starke, Florida.

The only question that remained after Bargo testified was whether Bargo's alibi and Bargo's story about how Hooper killed Jackson created a reasonable doubt as to Bargo's involvement in Jackson's murder. Ultimately, the totality of the evidence, including Bargo's numerous credible murder confessions and critical inconsistencies between Bargo's story and highly credible text message evidence and his own witness's testimony, demonstrated that Bargo's alibi and defense were simply implausible.

Claim III. Bargo's claim that the trial court erred in denying his motion for the appointment of a crime scene expert should also be denied. The trial court exercised sound discretion in denying Bargo's motion because Bargo failed to make a particularized showing of need. Bargo's claim that a crime scene expert was necessary to "answer anthropological questions" and assist counsel in "helping the jury understand the complexity of the crime scene and any exculpatory evidence that was in existence around the crime scene" was overly generalized and speculative. Bargo also fails to demonstrate that he was prejudiced by the trial court's denial of his motion. Bargo claims that a crime scene expert would have been able to assist Appellant's defense in locating and testing the .22 rifle found in Ely's house, however, both Bargo's and State witness Hooper's testimony established that Jackson was shot with Bargo's handgun, which rendered the existence of the rifle at the crime scene a non-issue.

Claim IV. The trial court exercised sound discretion in excluding penalty phase evidence about threats Jackson allegedly made against Bargo and his family. Even if Jackson's alleged threats played a part in Bargo's motive to kill Jackson, such was based on Bargo's interest in getting **revenge** for Jackson's threats, not fear. While there is precedent from this Court finding that a defendant's death sentence was improperly imposed where a defendant had a pretense of legal or moral justification because he had been seriously threatened by the victim and felt that he had to go on the offensive in order to safeguard his own health, nothing contained in the proffered evidence Bargo attempted to submit during his penalty phase would support a finding that Bargo felt compelled, at the time of the murder, to kill Jackson in order to safeguard his or his family's well being. Jackson was a fifteen year old boy who was killed while on his way to what Jackson believed to be an opportunity to rekindle his relationship with an ex-girlfriend from his neighborhood, who unfortunately happened to also be Bargo's love interest.

Claim V-VII. Long standing precedent from this Court dictates the denial of Bargo's *Ring* claim (Claim V) and his claim that the death penalty in general constitutes cruel and unusual punishment, (Claim VII) and said claims bring nothing new for this Court's consideration. Bargo's death sentence is also proportionate (Claim VI). Although the trial court found a substantial quantity of nonstatutory mitigation, the quality of Bargo's mitigation, in light of the relatively

slight weight the trial court afforded such, is far outweighed by the findings of the two weightiest aggravators set forth in Florida's statutory scheme, CCP and HAC.

ARGUMENT

ISSUE I: WHETHER DEFENDANT WAS AFFORDED OBVIOUSLY INEFFECTIVE ASSISTANCE OF COUNSEL THAT WAS INDISPUTABLY PREJUDICIAL TO DEFENDANT.

A. Standard of Review for Claims of Ineffective Assistance of Counsel Pursued on Direct Appeal.

Generally, to prevail on a claim that trial counsel's assistance was "so defective as to require reversal of a conviction or death sentence," a defendant must satisfy both prongs of *Strickland v. Washington*, 466 U.S. 668 (1984).

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. 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. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Id. at 687.

Under *Strickland,* trial counsel is deficient when: (1) he has not fulfilled his duty to conduct the reasonable investigations necessary to make sound strategic decisions, and (2) when counsel's "particular acts or omissions were outside the wide range of professionally competent assistance." *Id*. at 690. The Court refrained from providing specific guidelines to evaluate counsel's performance. *Id.* at 688.

Instead, the Court held "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.*

However, as Bargo concedes,[16] "a claim of ineffectiveness generally can be raised in a rule 3.850 motion but not on direct appeal." *Bruno v. State*, 807 So. 2d 55, 63 (Fla. 2001), n.14 (*See, e.g., Wuornos v. State*, 676 So. 2d 972, 974 (Fla.1996) ("We find that this argument constitutes a claim of ineffective assistance of counsel not cognizable on direct appeal, but only by collateral challenge."); *Kelley v. State,* 486 So. 2d 578, 585 (Fla. 1986) ("Generally, such claims [of ineffectiveness] are not reviewable on direct appeal but are more properly raised in a motion for postconviction relief."). A claim of ineffectiveness can properly be raised on direct appeal only if the record on its face demonstrates ineffectiveness. *See Wuornos,* 676 So. 2d at 974.

The following excerpts from United States Supreme Court decisions explain why it is better practice to pursue claims of ineffective assistance of counsel on collateral review:

> The right involved—adequate assistance of counsel at trial—is . . . critically important. . .[P]ractical considerations, such as the need for a new lawyer, the need to expand the trial court record, and the need for sufficient time to develop the claim, argue strongly for initial consideration of the claim during collateral, rather than on direct, review. See *Martinez,* 566 U.S., at ——, 132 S.Ct., at 1318; see also

[16] *See Initial Brief* at 52.

Massaro v. United States, 538 U.S. 500, 505, 123 S.Ct. 1690, 155 L.Ed.2d 714 (2003).

Trevino v. Thaler, 133 S.Ct. 1911, 1921 (2013)

> Ineffective-assistance claims often depend on evidence outside the trial record. Direct appeals, without evidentiary hearings, may not be as effective as other proceedings for developing the factual basis for the claim. *Ibid.* Abbreviated deadlines to expand the record on direct appeal may not allow adequate time for an attorney to investigate the ineffective-assistance claim. See Primus, Structural Reform in Criminal Defense, 92 Cornell L.Rev. 679, 689, and n. 57 (2004) (most rules give between 5 and 30 days from the time of conviction to file a request to expand the record on appeal). Thus, there are sound reasons for deferring consideration of ineffective-assistance-of-trial-counsel claims until the collateral-review stage. . .

Martinez, 132 S.Ct., at 1316.

> When an ineffective-assistance claim is brought on direct appeal, appellate counsel and the court must proceed on a trial record not developed precisely for the object of litigating or preserving the claim and thus often incomplete or inadequate for this purpose. Under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), a defendant claiming ineffective counsel must show that counsel's actions were not supported by a reasonable strategy and that the error was prejudicial. The evidence introduced at trial, however, will be devoted to issues of guilt or innocence, and the resulting record in many cases will not disclose the facts necessary to decide either prong of the *Strickland* analysis. If the alleged error is one of commission, the record may reflect the action taken by counsel but not the reasons for it. **The appellate court may have no way of knowing whether a seemingly unusual or misguided action by counsel had a sound strategic motive or was taken because the counsel's alternatives were even worse**. See *Guinan*, *supra*, at 473 (Easterbrook, J., concurring) ("**No matter how odd or deficient trial counsel's performance may seem, that lawyer may have had a reason for acting as he did .... Or it may turn out that counsel's overall performance was sufficient despite a glaring omission** ..."). The trial record may contain no evidence of alleged errors of omission, much less the reasons underlying them. And evidence of

> alleged conflicts of interest might be found only in attorney-client correspondence or other documents that, in the typical criminal trial, are not introduced. See, *e.g., Billy-Eko, supra,* at 114. Without additional factual development, moreover, an appellate court may not be able to ascertain whether the alleged error was prejudicial.
>
> . . . In addition, the [postconviction] motion often will be ruled upon by the same district judge who presided at trial. The judge, having observed the earlier trial, should have an advantageous perspective for determining the effectiveness of counsel's conduct and whether any deficiencies were prejudicial.

Massaro v. U.S., 538 U.S. 500, 504-506, 123 S.Ct. 1690, 1694 (2003) (emphasis added).

Accordingly, while appellate courts in Florida will entertain claims of ineffective assistance of counsel on direct appeal, a finding of such will only be made when "the ineffectiveness is **obvious** on the face of the appellate record, the prejudice caused by the conduct is **indisputable**, and a tactical explanation for the conduct is **inconceivable**." *Corzo v. State*, 806 So. 2d 642, 645 (Fla. 2d DCA 2002) (emphasis added). The ineffectiveness must be so clear that "it would be a waste of judicial resources to require the trial court to address the issue." *Blanco v. Wainwright*, 507 So. 2d 1377, 1384 (Fla. 1987).

B. Analysis

Bargo's ineffective assistance of counsel claim utterly fails under the heightened standards Florida requires when such a claim is presented on direct appeal. Bargo identifies four (4) instances where his trial counsel was allegedly deficient, which Appellee will address in the order they appear in Bargo's *Initial*

Brief.

1. Defense Counsel's Failure to Refresh the Recollection and Impeach Kyle Hooper with his Statement that he Intended to "Put it on Mike."

Bargo contends his trial counsel was deficient by failing to refresh Hooper's recollection or impeach Hooper's testimony when Hooper answered as follows when defense counsel asked Hooper if he ever made the comment, "the only thing we have left is to blame this all on Mike:" "May I have, Yes, but there was a lot of things I don't remember, sir." (R39, V1357). Bargo claims counsel should have refreshed Hooper's recollection or impeached Hooper with "the statement," but never specifically identifies what form of prior inconsistent statement counsel should have used to refresh or impeach Hooper. *See Initial Brief* at 54-5. Regardless, review of the following excerpt of Hooper's complete testimony about this issue demonstrates why counsel was not deficient in this regard:

> MR. HOLLOMAN: When y'all were all together in interrogation, did you ever make the comment or hear the comment made that, The only thing we have left to do is blame this all on Mike?
>
> MR. HOOPER: I don't remember that, sir.
>
> MR. HOLLOMAN: Do you think you could -- could you have said that?
>
> MR. HOOPER: Mike had told me and I --
> MR. HOLLOMAN: No, could you have said that?
> . . .
> MR. HOOPER: **I remember saying that Mike had told me if the police came and things like that, to tell him, -- to tell the police he had done it, yes, and that -- and that's what I did,** but now -- but Ron Scott had told me that -- to tell the truth about what I had --

> MR. HOLLOMAN: That's not my question. Let me redirect you, okay. My question is, could you have said, The only thing we have left to do is pin it on Mike?
>
> MR. HOOPER: I don't remember saying that, no.
>
> MR. HOLLOMAN: May you have said that?
>
> MR. HOOPER: May I have, yes, but there was a lot of things I don't remember, yes, sir.
>
> MR. HOLLOMAN: Why is there a lot of things you don't remember?
>
> MR. HOOPER: There was a lot of things said.

(V39, R1357-8) (emphasis added). Because Hooper testified that Bargo told Hooper to pin the crime on Bargo if the police came and that Hooper fully intended to do so, trial counsel cannot logically be found to be ineffective for failing to refresh Hooper's recollection about a statement that would only redundantly serve to show Hooper's intent to pin the crime on Bargo.

Further, Bargo was not prejudiced, and certainly was not indisputably prejudiced. Ultimately, Hooper did not deny counsel's question, and trial counsel's cross examination likely left the jury with the impression that Hooper did say something similar to, "Now all we need to do is pin it on Mike" to his codefendants when they were in the interview room. Nonetheless, even if Hooper

freely admitted making the statement, such was hardly exculpatory evidence.[17] The record demonstrates that the five (5) codefendants were a close knit group and while Bargo denied that he was involved in the shooting, it is indisputable that all five codefendants worked together in an attempt to conceal Jackson's murder. Codefendants pointing fingers at each other once apprehended by the police is nothing new to our criminal jurisprudence and in light of substantial evidence tying Bargo to Jackson's murder, Hooper's admission to the disputed statement, either voluntarily or through impeachment, would have had no effect on the outcome of the jury's verdict.

2. Trial Counsel's Closing Argument that Bargo was "Guilty as Hell" of Second Degree Murder.

Despite the fact that Bargo testified at trial and admitted that he orchestrated the disposal of Jackson's remains at the quarry, Bargo now claims that he "maintained his innocence" at trial and was prejudiced by counsel's alleged ineffective closing argument, which attempted to convince the jury that Bargo was only proven guilty of second degree murder. This subclaim epitomizes why ineffective assistance of counsel claims are best raised on collateral appeal where factual development could assist this Court in rendering a just decision based on

[17] In light of the facts, Hooper's statement would be no more exculpatory in nature than if historical outlaw Bonnie Parker was heard telling other members of the Barrow Gang that "all they needed to do is pin it on Clyde."

the merits. For instance, the record seems to indicate that Bargo's trial counsel was put between the proverbial rock and hard place once Bargo choose to testify. Multiple discussions were held between counsel and the trial court regarding the manner in which Bargo could testify in light of limitations placed on trial counsel pursuant to the Rules of Professional Conduct, which ultimately resulted in Bargo being permitted to testify in the narrative. (V46, R5-6). This ruling was presumably made because of the prohibition against counsel from asking a question which he knew would invoke a perjured response, but presumptions are far from the best way for this Court to evaluate any claim.

The record is replete with references to the discussions trial counsel had with the trial court regarding this issue, but essentially devoid of any specifics concerning counsel's discussions with Bargo, which is imperative to know in order to adjudge counsel's effectiveness. Prior to Defendant testifying, the following discussion occurred:

> THE COURT: . . . About 20 minutes ago I had a conference in my hearing room with the attorneys and I was advised that Mr. Bargo had changed his mind and does want to testify in this trial. Is that correct, counsel?
>
> MR. HOLLOMAN: He's vacillating judge . . .
>
> He told me that he wanted to testify this weekend. Now, I talked to him – I talked to him again this weekend. Now this morning there is vacillation it seems as to whether he wants to testify, Judge, and I told him, I said, Look, it's time to basically man up on this thing . . .

> So he's watched cross-examination. I've engaged him in direct examination. I visited him at the jail. I've listened to his entire story. I know what his story is. I'm very conversant with it. I'm conversant with the benefits of it, which I've explained to him, and I've also explained to him the possible liabilities of it and that's all a lawyer can do.

(V38, R1174-5).

In the midst of Bargo's verbose narrative testimony, the following discussion occurred after the trial court took a recess:

> MR. HOLLOMAN: I could push him along in the time table, but I'm reluctant to do so because of the rules of professional conduct, I don't want it to be seen as I'm, you know what I'm talking about.
>
> THE COURT: Based on the nature of the case, I'm reluctant to do so.
>
> MR. HOLLOWMAN: So we're okay with that procedure?
>
> THE COURT: Yes, sir.

(V38, R1246). Prior to closing arguments, another discussion relevant to counsel's dilemma occurred at the bench:

> THE COURT: Have you read that Mr. Holloman?
>
> Counsel, approach the bench.
>
> For review, the State has presented the case of Sanborn S-A-N-B-O-R-N vs. State, 474 So. 2d 309 Third District Court of Appeal 1985.
>
> It appears, Mr. Holloman, by this case, that you are prohibited to argue in closing argument what you believe to be perjured testimony.
>
> MR. HOLLOMAN: Well, gee, some of it is and some of it isn't.
> . . .
> MR. HOLLOMAN: **Kind of puts me in a dilemma here**.

(V40 R1376-7) (emphasis added). Finally, prior to Bargo's *Spencer* hearing, the following discussion occurred in reference to a letter Bargo sent to the trial judge:

> MR. HOLLOMAN: We all know the purposes of why we're here today. We're not here to argue any sort of ineffective assistance claim. This complaint in this letter is that he was – that he gave testimony in the narrative form. Okay.
>
> And that I, secondly, am not permitted under the rules of professional conduct to argue his perjury, which simply is what it is, as a defense. And what he claims as a result of that is that basically I threw him under the bus. What we did was this: Based upon the available admissible evidence that was lawfully before the Court, even the Court ruled that my conduct beforehand – **because we discussed this – we had a pretrial – off-the-record pretrial** before and then we discussed it on the record several times.
>
> The case law was there -- Ellis Rubin cases -- we all had that case, so we were all very conversant in the rules of professional conduct. Now what he wants to do this morning is he wants to get up there and engage in a diatribe of how he was thrown under the bus because of that and how certain witnesses were not called that could have proven his innocence.
>
> THE COURT: Well, I find -- let me state it this way: **I found at the time that narrative testimony was the only way in which Mr. Bargo would be able to testify.** I continue to make that finding. I am not going to go back and readdress that issue."

(V46, R5-6) (emphasis added).

Clearly, trial counsel was in a dilemma based on Bargo's last minute decision to testify, seemingly falsely, at trial. However, the specifics of counsel's dilemma is unclear from the record. As the United States Supreme Court aptly noted, "[i]f the alleged error is one of commission, the record may reflect the action taken by

counsel but not the reasons for it. **The appellate court may have no way of knowing whether a seemingly unusual or misguided action by counsel had a sound strategic motive or was taken because the counsel's alternatives were even worse**." *Massaro*, 538 U.S. at 506 (emphasis added). In the instant case, this subclaim must be rejected on direct appeal because testimony from trial counsel is imperative to discern the specific reasons why Bargo testified in the narrative and whether such considerations played a part in trial counsel's strategy to argue for a second degree murder conviction during closing.

3. Urging Bargo to Tell the Trial Court Whether Bargo Wanted "Regular or Extra Crispy" During Allocution.

This argument is based on a distortion of trial counsel's statement to Bargo during allocution. Bargo alleges that defense counsel "urged Appellant to tell the trial court whether Appellant wanted "[r]egular or extra crispy"." *Initial Brief* at 60. However, this argument takes defense counsel's comment out of context. Despite being given wide latitude to testify for hours in the narrative during trial, Bargo used his opportunity for allocution to complain to the trial court about his belief that he did not get an opportunity to show his innocence. The trial court attempted to focus Bargo on the purpose of allocution as follows:

> THE COURT: This is your opportunity to address me in regards to what sentence should be imposed.
>
> MR. BARGO, JR.: I mean, Your Honor, I really – I don't know. I mean I think it is terrible what happened….But I didn't do this, I

know I didn't do this.

I shouldn't get the death penalty. I shouldn't get a life sentence. But I can't make that judgment. I didn't get a chance to even prove my innocence. I guess I can't really even argue what I should get. I never got a chance to prove I was innocent. I never got the chance to argue this.

THE COURT: This is your right to make a statement in regards as to what sentence should be imposed.

MR. BARGO, JR.: I don't know. You want me to ask for life in prison for something I didn't do?

MR. HOLLOMAN: May I, Judge? If I could lead him with a question?

THE COURT: Yes, sir.

MR. HOLLOMAN: There are two choices here, basically. Regular or extra crispy so to speak. It's either life without the eligibility for parole or death by lethal injection. Now, this has been explained to you. It's logical for you to argue for life, unless you want to be a death volunteer.

And I would assume that's not the case. Because if you plan on appealing, I would think you would want to be alive for that appeal. What I would suggest to you is to talk about some of these other things we talked about that would mitigate to a life sentence.

Because you wanted the right of allocution and you have got it. Okay. Just take a deep breath.

Maybe it would be appropriate to give him a minute and let him collect his thoughts?

THE COURT: Mr. Bargo?

MR. BARGO, JR.: Your Honor, I don't want to die. Obviously nobody wants to. I mean, but I'm not going to ask you for a life

> sentence either. I'm not. Not for something I know I didn't do. And I don't want to die. I really don't. I was 18 years old then.
>
> THE COURT: That will conclude the *Spencer* hearing for this afternoon …

(V46, R135-8).

Clearly, trial counsel never "urged Appellant to tell the trial court whether Appellant wanted regular or extra crispy." And trial counsel's colloquial reference to two well-known choices when ordering fried chicken did not "belittle" Bargo as Bargo now claims.[18] Rather, it appears counsel was attempting to use levity to relax Bargo, so he could better focus on and understand the purpose of allocution, which is consistent with trial counsel's subsequent suggestion that Bargo take a deep breath and take some time to collect his thoughts. Bargo's claim utterly fails to show how trial counsel's colloquialism constituted obvious ineffectiveness that was indisputably prejudicial to Bargo. This claim should be denied.

4. Failing to Argue to the Jury that the Projectiles Retrieved from the Victim's Remains did not Match the Bullets Retrieved from the Cylinder of the Murder Weapon.

Bargo claims there is a reasonable probability that bringing the jury's attention to the fact that a different type of bullet was used to shoot the victim than what was recovered in the cylinder of Bargo's gun would have created a reasonable doubt in

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[18] *See Initial Brief* at 61.

the minds of the jurors. *Initial Brief* at 62. Bargo thus claims that trial counsel was ineffective for failing to raise this point to the jury during closing arguments. However, once all of the evidence had been submitted to the jury, there was simply no question of fact concerning the identity of the murder weapon and Bargo cannot be found to have been indisputably prejudiced by trial counsel's decision to not address this point in closing argument.

Maria Pagan, expert in firearms examination and identification with the Florida Department of Law Enforcement, tested the projectile found in Jackson's remains and concluded that it was a .22 caliber bullet which had striations with the same class characteristics – 6 grooves with a right twist - as Bargo's .22 caliber handgun. (V35, R904). Due to the condition of the bullet at the time of testing, there was not enough of a degree of agreement or disagreement of individual characteristics of the striations to determine whether the spent bullet came specifically from Bargo's gun. (V35, R907). While this factor may have created a potential question regarding the identity of the murder weapon, Bargo's trial testimony ultimately removed any doubt. Bargo testified that Hooper killed Jackson with Bargo's gun and that Soto subsequently hid the gun under the house in a floor vent. (V38, R1251) (V39, R1367-9). Further, since law enforcement found at least two different types of .22 casings at Ely's house, it was not surprising that the only bullet recovered from Jackson's remains did not match the bullets found in the

chambers of Bargo's gun. (V34, R805-6).

Bargo admission that his handgun was the murder weapon left trial counsel with little reason to vehemently argue reasonable doubt based on the identity of the murder weapon. Nonetheless, trial counsel's closing argument did question whether the State proved that the bullet found in Jackson's remains came from Bargo's gun as follows:

> MR. HOLLOMAN: . . . We look at the -- for example, the gun. . . What about the gun? Where did the bullet come from, okay? And they said, Ms. Berndt says well, they solved that riddle because they say he shot. Did you see any other gun in this case? In the video you saw what was clearly a .22 caliber rifle leaning against a wall. What part did that play?

(V40, R1402). While trial counsel did not spend much time arguing this point in closing, such was consistent with trial counsel's trial strategy to argue for second degree murder, a strategy that would not logically depend upon challenging the identity of the murder weapon.

In *Hildwin v. State*, 84 So. 3d 180, 186-187 (Fla. 2011) this Court noted that:

> The defendant carries the burden to "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " *Id.* (quoting *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83 (1955)). "Judicial scrutiny of counsel's performance must be highly deferential." *Id.* In *Occhicone v. State*, 768 So.2d 1037, 1048 (Fla.2000), this Court held that "strategic 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."

Hildwin, 84 So. 3d at 186-187. Bargo's ineffective assistance of counsel claims,

individually and in their totality, utterly fail to overcome the presumption that trial counsel's actions were matters of sound trial strategy. As argued *supra*, it is impossible to know what limitations were placed on trial counsel in light of Bargo's seemingly perjured testimony at trial. It is also impossible to know on direct appeal what courses of action were considered and rejected by trial counsel in light of Bargo's last minute decision to testify, apparently falsely. Bargo's ineffective assistance of counsel claim must fail.

ISSUE II: WHETHER THE EVIDENCE WAS SUFFICIENT TO CONVICT BARGO OF CAPITAL MURDER.

Bargo claims that "under the standard jury instruction regarding reasonable doubt and the applicable standard of review, a [rational] trier of fact could not find the existence of the elements of first degree murder with a firearm beyond a reasonable doubt." *Initial Brief* at 67. In support, Bargo cites to Florida Standard Jury Instruction 3.7 (2013) which instructs, "A reasonable doubt as to the guilt of the Defendant may arise from the evidence, conflicts in the evidence, or lack of evidence," and claims that "the State's own evidence, conflicts in that evidence, and the lack of evidence created more than a reasonable doubt regarding Appellant's lack of involvement in the murder." *Id*. However, Bargo's testimony ultimately confirmed much of the State's evidence which established not only Bargo's involvement in Jackson's murder, but also his orchestration of it.

During trial, Bargo denied being at the murder scene at the time Jackson was killed but admitted that he arrived at the scene shortly thereafter. Bargo admitted that he assisted with the subsequent cover-up, though he alleged that he only did so due to threats he received from his friend, Kyle Hooper. However, Bargo's alleged fear of Hooper rings hollow in light of Bargo's testimony that Soto hid Bargo's gun from Hooper after the murder in a floor vent where there was "no way anybody other than [Bargo] or the girls could get [it]." (V38, R1255-6). Bargo also admitted he attended the fence-line meeting with Ely's neighbors who were concerned about the fire that was used to burn Jackson's body. (V38, R1250).

Bargo also verified that he coordinated the dumping of Jackson's remains at the Ocala quarry. Bargo testified, "I had James back the truck up to the dumpster. Soto got into the dumpster and started handing out buckets to James. . . I grab a couple of cinder blocks and there's this red dog leash. We put that in the back of the truck." (V38, R1261-2). While on their way to the quarry, Bargo testified, "I told him to get me to Gander Mountain. I could show him how to get there from there. (V38, R1263). Bargo testified that when he arrived at the quarry, "I ended up carrying one of the cinder blocks. James had a bucket and a cinder block. Soto had two buckets. I had a cinder block and that red dog leash chain thing." (V38, R1264). Bargo also testified about his unique familiarity with the water depths at

the quarry and admitted that he told Havens and Soto to "[t]hrow it over the cliff face" where the water was deeper. (V38, R1264-5).

Bargo's testimony conclusively verified all of the State's evidence that was submitted to prove that Jackson was killed by Bargo's gun at the house in which Bargo was living, that Jackson's body was burned in the house's fire pit, and that Bargo, Soto, and Havens dumped Jackson's charred remains in the quarry the following day prior to Bargo fleeing the area to Starke, Florida. The only question that remained to be answered by the jury after Bargo testified was whether Bargo's alibi and Bargo's story about how Hooper killed Jackson created a reasonable doubt as to Bargo's involvement in Jackson's murder. Ultimately, the totality of the evidence submitted by the State and critical inconsistencies in Bargo's testimony demonstrated that Bargo's defense was simply implausible.

Bargo argues that the State relied primary on eyewitness testimony to prove its case, but in fact, it was the State's highly reliable non-testimonial evidence that ultimately belied Bargo's story about how Jackson was killed. According to Bargo, Hooper told him that Soto and Hooper were doing drugs in the bathroom when they heard a noise coming from the living room. Hooper armed himself with Bargo's gun and, according to Bargo's testimony:

> [Hooper] said him and Soto came out. When they came out he sees Seath sitting out in the living room. . . Kyle said he went out there and told Seath to get the F*** out of the house and he wouldn't leave. He said the girls came out, he demanded that they go back in the

> bedroom. They went back in the bedroom and he's sitting here and he said – he said he told Seath, Leave. . . . **Seath said he wasn't leaving until—until he talked to Amber.** That's what he said.
>
> Something got said about Alyssa and it just – he said it blew up. Something about Alyssa and he wouldn't leave. Well, Kyle got mad, so he tried to grab him to make him leave. So he grabbed him to make him leave. He said Seath punched him or hit him, a fight ensued…

(V39, R1367-8)

Bargo's story was wholly inconsistent with the State's non testimonial evidence depicting the text message discussions Wright had with Jackson just prior to Jackson's murder which read:

> Wright to Jackson: Hey can yuu tlk? (Message 45/52 Sent 8:12 p.m.)
>
> Jackson to Wright: You sed you needed to talk (Message 56/70 Sent 8:37 p.m.)
>
> Wright to Jackson: Well I kinda need to tlk to yuu aboiut us working things out? (Message 44/52 Sent 8:46 p.m.)
>
> Jackson to Wright: What you mean (Message 55/70 Sent 8:47 p.m.)
>
> Jackson to Wright: What you mean (Message 54/70 Sent 8:47 p.m.)
>
> Wright to Jackson: Can yuu plz call me like now (Message 43/52 Sent 8:48 p.m.)
>
> Jackson to Wright: Yeah sher. (Message 53/70 Sent 8:49 p.m.)
>
> Wright to Jackson: Hey my friend Charlie is coming wit I'v been telling her everything between me and yuu and shes coming bc i need her to help through this. Is that okay? But don tell any body whats going on bc i wanna make sure we can work things out before anyone knows (Messages 42/52 and 41/52 combined - Sent time

undeterminable from photo)

Jackson to Wright: **Amber if you have me jumpt I will never give you the time of day so if I git jumpt say goodby alrite** (Message 52/70 Sent 8:56 p.m.)

Wright to Jackson: I swear your not seath. I could never do that to yuu. I just want yuu and me back (Message 40/52 Sent time undeterminable)

Jackson to Wright: Ok (Message 51/70 Sent 8:58 p.m.)

Wright to Jackson: Im walking up the hill now. (Message 39/52 Sent 9:00 p.m.)

Wright to Jackson: I am at the neighborhood road. Where are yuu? (Message 37/52 Sent 9:08 p.m.)

Jackson to Wright: Srry I didint wunt will to here me but **stay around the courner wher me and you fot just wait rite ther il be ther in a minit** (Message 50/70 Sent time undeterminable)

(V5, R860-90) (emphasis added). This evidence established two facts which directly contradict the veracity of Bargo's story: a) Jackson was worried about being "jumped" or ambushed by Bargo and Hooper when he agreed to meet Wright; and b) Jackson and Wright met at a neighborhood street corner and then walked to Ely's house together from there. Since Jackson was worried about being "jumped" by Bargo and Hooper before he met Wright that evening, it would defy logic for Jackson to have refused to leave and ultimately instigate a fight with Hooper when Jackson was confronted by Hooper and Soto while Jackson was alone and unarmed inside their house. Further, Bargo's testimony that Jackson

refused to leave "until he talked to [Wright]" is even more implausible because Jackson met Wright at a neighborhood corner and would have accompanied Wright (and would have already talked to Wright) on their way to Ely's house.

Conversely, Hooper's testimony about the commission of Jackson's planned ambush murder was consistent with the State's evidence, including the highly reliable text message evidence. Hooper testified that once Wright convinced Jackson to come to Ely's house, Bargo's plan called for Wright to text Bargo and Hooper to let them know when Jackson was down the road so they could "get ready." (V39, R1341). Bargo's plan then called for Soto to hit Jackson with a piece of wood when Jackson entered the house, then for Bargo and Hooper to jump on Jackson and for Bargo to shoot Jackson. (V39, R1340). However, Hooper testified that the murder did not occur exactly to Bargo's plan. Wright did not send a warning text to Bargo, and when Jackson entered Ely's house, Soto "didn't do anything." *Id*. Bargo and Hooper were in Bargo's bedroom debating whether to kill Jackson when Jackson entered Ely's living room. (V39, R1341). From Bargo's bedroom, Hooper could see Jackson sitting in the chair in the living room and, after being pressured by Bargo, Hooper grabbed a piece of wood, **ran** into the living room, and hit Jackson over the head with it. (V39, R1342) (emphasis added). Bargo followed Hooper into the living room with his gun and started shooting Jackson. *Id*. Hooper's version of events described a planned ambush attack which

was clearly more consistent with manner in which Wright lured Jackson to Ely's house, as evidenced by the highly credible text messages.

Furthermore, the extensive eyewitness testimony concerning Bargo's multiple murder confessions and incriminating statements was highly credible under the facts and circumstances of Bargo's case. Interestingly, Bargo testified that several of these confession witnesses misunderstood him when he told them that Hooper killed Jackson because Jackson raped Wright (V38, R1275).[19] While the complete veracity of this testimony is doubtful, it nonetheless confirms that Bargo did in fact discuss Jackson's murder with these State witnesses. Further, all of the witnesses to Bargo's confessions and incriminating statements were either strangers who met Bargo in jail or friends who lived in Starke, Florida. None of these witnesses had any connection to Hooper or anyone else involved in Jackson's murder and thus had no possible motive to fabricate their testimony about Bargo's confessions to Jackson's murder.

Further, Bargo's alibi was tenuous, unsubstantiated, and based on facts that were ultimately refuted by his own witness. Bargo testified that he had been walking to Taylor Strawn's ("Strawn") house alone for nearly two hours at the

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[19] Retired corrections officer, David Smith's, testimony that he overheard Bargo telling another inmate that "[t]here were only two witnesses who saw me shoot him" was, however, unrefuted by Bargo. (V37, R1137).

time of Jackson's murder. (V38, R1235-43). Bargo explained how he made these plans as follows:

> I end up getting a phone call from the girl I was supposed to go to her house. I was supposed to go to her house that night, the night before and I completely blew her off and I had been dreading this phone call. I get this phone call from her and she's – you know, she's hitting me pretty good. Your weren't – you know, You didn't show up, blah, blah, blah, you know. . . I said, Look babe, I'll be there tonight, all right. I'll be there tonight. I promise, I'll be there tonight. And she says, you know, You sure? You're not going to – you know, you're not going to just blow me off? I said, No, I'll be there tonight, I promise.

(V38, R1217-8). Bargo testified that after walking for hours on his way to Strawn's house he vomited from drinking too much, changed his mind about going to Strawn's house, and obtained a ride home from his father who allegedly picked Bargo up at a convenience store. (V38, R1243-4).

Bargos story was unsubstantiated and actually conflicted with his witness' testimony. Bargo did not call his father, who appeared to be Bargo's sole alibi eyewitness,[20] to testify at the guilt phase of his trial. Bargo did however call Strawn

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[20] Bargo's father did testify during the penalty phase of trial. Bargo Sr. testified that he drove to Ely's house because Bargo called him around midnight on the night of the murder to ask for cigarettes. It appears this was the first time Bargo Sr. had seen Bargo that day. Bargo Sr. testified:

> He just asked me for a couple of cigarettes and **I was a little bit angry with him because he was supposed to have been over to the house to help me do some yard work and I seen where he had**

to testify. While Strawn did verify that she expected Bargo to visit her on Sunday, the night of the murder, she refuted Bargo's testimony about how those plans were made, testifying:

> MR. HOLLOMAN: Directing your attention to April 17, 2011, did you have plans with Michael Bargo that particular evening?
>
> STRAWN: Yes, sir.
>
> MR. HOLLOMAN: When had he contacted you about those plans?
>
> STRAWN: The last time I talked to him was Friday before that. . .
>
> MR. HOLLOMAN: . . . Did he ever show up?
>
> STRAWN: No, sir.
>
> MR. HOLLOMAN: Did he ever call?
>
> STRAWN: I don't remember. I don't think he called that day.

(V39, R1323). Interestingly, Strawn did not recall calling Bargo on Sunday or even speaking with Bargo on the day of Jackson's murder whatsoever. Furthermore, the mere fact that Bargo had plans to do something other than kill Jackson on the night of the murder and that Bargo cancelled those plans without calling the person with whom Bargo had such plans is arguably the opposite of

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> **some more tattoos on him** and that was really about it. I was starting to get heated, I said, I'm going home and that was it, I went home.

(V42, R177-9).

alibi evidence.

While Bargo does not specifically argue within this claim that the trial court erred in denying Bargo's motions for judgment of acquittal, he references the following standard of review regarding appellate review of such rulings as follows, with which the State agrees: "In reviewing a motion for judgment of acquittal, a de novo standard of review applies. *Pagan v. State,* 830 So. 2d 792, 803 (Fla. 2003)." (*Initial Brief* at 67). In the instant case, Bargo's motions for judgment of acquittal were properly denied and should be affirmed.

> Generally, an appellate court will not reverse a conviction that is supported by competent, substantial evidence. *See id.* (citing *Donaldson v. State,* 722 So.2d 177 (Fla.1998); *Terry v. State,* 668 So.2d 954, 964 (Fla.1996)). If, after viewing the evidence in a light most favorable to the State, a rational trier of fact could find the existence of the elements of the crime beyond a reasonable doubt, sufficient evidence exists to sustain a conviction. *See Pagan,* 830 So.2d at 803 (citing *Banks v. State,* 732 So.2d 1065 (Fla.1999)). In moving for a judgment of acquittal, a defendant "admits not only the facts stated in the evidence adduced, but also admits every conclusion favorable to the adverse party that a jury might fairly and reasonably infer from the evidence." *Beasley v. State,* 774 So.2d 649, 657 (Fla.2000) (quoting *Lynch v. State,* 293 So.2d 44, 45 (1974)). We have stated that "courts should not grant a motion for judgment of acquittal unless the evidence is such that no view which the jury may lawfully take of it favorable to the opposite party can be sustained under the law." *Lynch,* 293 So.2d at 45.

Reynolds v. State, 934 So. 2d 1128, 1145 (Fla. 2006).

The totality of the evidence presented to the jury including the State's evidence in general and: Bargo's multiple and detailed out-of-court confessions; Bargo's

testimonial confessions and statements against interest; the critical inconsistencies between Bargo's story and the highly reliable text message evidence and his own witness' testimony; and Bargo's attempt to evade prosecution by fleeing from the scene of the crime[21] clearly provided any rational trier of fact with sufficient evidence to find the existence of the elements of first degree murder with a firearm beyond a reasonable doubt. This claim should be denied.

ISSUE III: WHETHER THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING BARGO'S REQUEST FOR THE APPOINTMENT OF A CRIME SCENE INVESTIGATOR.

Bargo next claims that the trial court erred by denying Bargo's motion for the appointment of a crime scene investigator. *Initial Brief* at 73. "This Court reviews the denial of a motion for appointment of experts for an abuse of discretion." *Howell v. State*, 109 So. 3d 763, 776 (Fla.2013) (citing *Marshall v. Crosby*, 911 So. 2d 1129, 1133 (Fla. 2005)). In evaluating whether there was an abuse of discretion, courts have applied a two-part test: (1) whether the defendant made a particularized showing of need; and (2) whether the defendant was prejudiced by the court's denial of the motion requesting the expert assistance. *Marshall*, 911 So.

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[21] "[W]hen a suspect endeavors to evade prosecution by flight, such fact may be shown in evidence as one of the circumstances from which guilt may be inferred." *Spinkellink v. State*, 313 So. 2d 666, 670 (Fla. 1975) (citing *Daniels v. State*, 108 So. 2d 755 at 760 (Fla. 1959).

2d at 1133 (citing *San Martin v. State*, 705 So. 2d 1337, 1347 (Fla. 1997)) (citation omitted) (emphasis added).

The trial court exercised sound discretion in denying Bargo's motion because Bargo failed to make a particularized showing of need for the appointment of a crime scene expert. Bargo claimed a crime scene expert was necessary to "answer anthropological questions" and assist counsel in "helping the jury understand the complexity of the crime scene and any exculpatory evidence that was in existence around the crime scene." *Initial Brief* at 70-71. This showing was both overly generalized and speculative. Bargo failed to identify the nature of the alleged "complexity" of the crime scene and the record does not indicate facts that support a finding that this crime scene was particularly "complex."[22] Further, Bargo's counsel could have asked the State's anthropological expert, Dr. Michael Warren, any anthropological questions counsel had during Dr. Warren's deposition. If Dr. Warren's answers were insufficient, counsel could have filed a subsequent, more particularized motion for an appointment of an anthropological expert.

Bargo also fails to demonstrate that he was prejudiced by the trial court's

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[22] The scene of the murder was limited to Ely's house and yard and Jackson's remains were found in a single isolated location at the Ocala quarry. The murder did not involve multiple shooters or require bullet trajectory analysis. The scene of the murder was not a remote location subject to rapidly changing or drastic weather conditions, etc.

denial of his motion for the appointment of a crime scene investigator. Bargo claims that a "crime scene expert would have been able to assist Appellant's defense in locating and testing [the .22 rifle found in Ely's house] for fingerprints and to see if the bullet found in the victim could have been fired from this rifle." *Id*. at 74. However, even if prints had been found on the rifle, such would only establish that the rifle had been touched or handled in the past by the person(s) whose prints were found on the rifle, and a crime scene expert could not conduct the testing required to match the bullet found in Jackson's remains to the rifle. Most importantly, both Bargo's and Hooper's testimony established that Jackson was shot with Bargo's handgun making the existence of the rifle at the crime scene a non-issue. Expert testimony further supported Bargo's and Hooper's testimony about the murder weapon by verifying that the bullet found in Jackson's remains had the same striation characteristics as Bargo's revolver - six grooves with right hand twist. (V35, R904).

Even if the trial court erred in denying Bargo's motion for the appointment of a crime scene expert, any such error was harmless in light of the overwhelming evidence of Bargo's guilt adduced at trial. A harmless error analysis applies to claims of trial court error in denying motions for appointment of experts. *See Morgan v. State*, 639 So. 2d 6, 12 (Fla. 1994) (while we agree that the trial judge should not have refused Morgan's request on the grounds that the experts were

biased, we find that the denial of Morgan's request for additional experts was harmless given the number of experts previously retained to aid in his defense.) The State clearly established that Bargo had motive and opportunity to kill Jackson. Jackson believed he was on his way to rekindle a romantic relationship with Bargo's love interest, Wright, when Jackson was ambushed and murdered. Bargo's denial of his romantic relationship with Wright was untenable in light of Hooper's testimony about their relationship and Bargo and Wrights' decisions to get tattoos of each other's initials on private areas of their bodies. Bargo's alibi was unrealistic and unsubstantiated and Bargo's testimony about his orchestration of the cover up, Bargo's numerous out-of-court murder confessions, and the State's eyewitness testimony, expert testimony, and physical evidence was simply overwhelming evidence of Bargo's guilt. Any error in denying Bargo's motion to appoint a crime scene expert under the circumstances was harmless beyond a reasonable doubt. *See State v. DeGuilio*, 491 So. 2d 1129 (Fla. 1986).

ISSUE IV: WHETHER THE TRIAL COURT ABUSED ITS DISCRETION BY EXCLUDING EVIDENCE OF THREATS MADE BY THE VICTIM WHICH BARGO PROFFERRED DURING HIS PENALTY PHASE TO ESTABLISH THAT THE MURDER WAS NOT COMMITTED WITHOUT A PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

Bargo next claims the trial court abused its discretion during the penalty phase by excluding testimony about threats Jackson allegedly made against Bargo and his family arguing that such evidence was relevant to establishing that the murder was

not committed "without a pretense of moral or legal justification." *Initial Brief* at 75. "A trial court's admission or exclusion of evidence under section 921.141 is reviewed for abuse of discretion." *Snelgrove v. State*, 107 So. 3d 242 (Fla. 2012) (citing *Miller v. State*, 42 So.3d 204, 225 (Fla.2010), *cert. denied*, —— U.S. ——, 131 S.Ct. 935, 178 L.Ed.2d 776 (2011)). The trial court's ruling regarding this evidence was neither error nor an abuse of discretion.

While there is precedent wherein this Court has reversed a trial court's finding of CCP because the defendant had a "pretense of moral or legal justification" to commit murder due to a victim's threats of violence, *to wit*; *Christian v. State*, 450 So. 2d 450 (Fla. 1989) and *Banda v. State*, 536 So. 2d 221 (Fla. 1988), these cases are easily distinguishable from the instant case. This Court described the circumstances leading to the murder in *Christian* as follows:

> Later that day, Moore was still harboring an insane hatred of Christian over the incident. Sneaking up behind Christian, Moore brandished a forty-pound curling iron used by weight lifters and smashed it into Christian's head, knocking him unconscious immediately. Moore would have continued pounding Christian had another inmate not intervened. Even then, Moore begged the other inmate to release him so he could kill Christian. Christian suffered a deep head wound, requiring stitches and two days of observation.
>
> Moore's violence toward Christian did not end with the attack. For the next few weeks, Moore mounted a constant barrage of threats at Christian and threatened to kill Christian's parents when he was released from prison. He threatened to inflict further injury on Christian, promised he would kill Christian sooner or later, and made repeated suggestions that Christian would be forced to become his

> homosexual object. These threats continued up until the day of Moore's death.

Christian, 550 So. 2d at 451.

In *Banda*, this Court explained the threat facing the defendant as follows:

> One of the state's witnesses, Allen Jones, who described himself as the victim's best friend, testified under oath that he witnessed the victim threaten appellant with a severe beating. Another of the state's witnesses, Frank Townsend, testified that appellant was fearful the victim would try to kill him:
>
> Q. All right, and what exactly did Banda tell you?
>
> A. He said that, Mmm, Terry had threatened the next time he seen him that he was going to kill him, so he said he wasn't going to hide from him, he was going to get him first.
>
> One of appellant's cellmates in jail, Charles Blanton, testified that appellant also had said that "the guy threatened to kill me so I figured I better get him first." Other testimony corroborated the victim's propensity for violence. For instance, the victim's nickname among friends was "Rambo," and he had boasted of shooting his ex-wife in the face.

Banda, 536 So. 2d at 222-223.

These cases are distinguishable because the victims' threats of violence in *Christian* and *Banda* were imminent and the defendants believed they needed to go on the offensive in order to protect themselves. In fact, the same manner in which this Court distinguished these cases in *Cox v. State*, 819 So. 2d 705, 721-722 (Fla. 2002) applies to the instant case:

> Cox argues that because he had been the victim of a burglary, and **wanted revenge**, he "certainly had a *pretense* of moral or legal justification." In support of this argument, the appellant points to this

> Court's opinions in *Christian v. State*, 450 So. 2d 450 (Fla. 1989), and *Banda v. State*, 536 So. 2d 221 (Fla.1988). These two cases, however, are easily distinguished. In both, this Court held that the defendant had a pretense of legal or moral justification because he had been seriously threatened by the victim and felt that he had to go on the offensive in order to safeguard his own health. *See Christian*, 550 So. 2d at 452 ("[T]he record is replete with unrebutted evidence of the victim's threats of violence to Christian and his apparent inclination to fulfill them."); *Banda*, 536 So. 2d at 225 ("[T]he victim was a violent man and had made threats against appellant.").

(italicized emphasis in original, bold emphasis added).

Similarly, even if Jackson's alleged threats did play a part in Bargo's motive to kill Jackson, such was based on Bargo's interest in getting **revenge** for Jackson's threats, not fear. Both victims in Christian and Banda made it very clear to their ultimate killers that they would kill them the first chance they got and both victims had bragged of, or demonstrated, extreme violence that went well beyond a high school fistfight. Unlike the extremely violent prison inmate involved in *Christian* or the violent man known to his friends as "Rambo" who openly boasted about having shot his wife in the face in *Banda*, Jackson was a fifteen year old boy who was killed while on his way to what he believed to be an opportunity to rekindle his relationship with an ex-girlfriend from his neighborhood. Nothing contained in the proffered evidence Bargo attempted to submit during his penalty phase supported a finding that Bargo felt compelled at the time of the murder to kill Jackson in order to safeguard his or his family's well being.

Bargo argues that this evidence "was relevant to explain rage toward the

victim– though insufficient to reduce the degree of murder– and thus rebutted any evidence that the murder was committed in a cold manner." *Initial Brief* at 76 (citation omitted). However the facts of the instant murder were wholly inconsistent with a heat of the moment act fueled by rage.[23] As the trial court specifically noted:

> I have been a member of the Florida Bar for 32 years. The first 16 of those years I was a practicing attorney, I served as a prosecuting attorney, I served as a defense attorney. I have prosecuted murder cases[, I] have defended murder cases. For the past 16 years I have had the privilege of serving as a circuit court judge, during much of that time I presided over a criminal docket. I reference my experience to note that this is the most cold, calculated and premeditated case of murder I have ever seen.

(V47, R5). Furthermore, even if the trial court erred in excluding the proffered testimony, any such error was harmless beyond a reasonable doubt, for as the trial court aptly noted, "The court emphasizes that the aggravating circumstances when considered alone would each justify the imposition of the death penalty in this case." (V47, R5). See also *Heyne v. State,* 88 So. 3d 113,126 (Fla. 2012) ("[T]he

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[23] Bargo, working in concert with his codefendants, lured Jackson to the scene of the murder with the promise of reconciling with Jackson's former girlfriend, Amber Wright. Bargo then ambushed Jackson, wounded Jackson with gunshots, and ultimately subdued him with Soto and Hooper's help. Jackson was subsequently placed in a bathtub where Bargo stayed alone to make sure Jackson knew who was going to be killing him. Bargo then shot Jackson in the face and orchestrated the dismemberment and burning of Jackson's body, including personally removing Jackson's teeth from his skull. Ultimately Jackson's charred remains were dumped at a location that was known only to Bargo.

heinous, atrocious, or cruel aggravator is one of the 'most serious aggravators set out in the statutory sentencing scheme.' " *Aguirre–Jarquin v. State,* 9 So. 593, 610 (Fla. 2009) (quoting *Larkins v. State,* 739 So. 2d 90, 95 (Fla. 1999)); *Silvia v. State*, 60 So. 3d 959, 974 (Fla. 2011) (The CCP aggravator is one of the most serious aggravators set out in the statutory sentencing scheme. *Buzia v. State,* 926 So. 2d 1203, 1216 (Fla. 2006).)

ISSUE V: WHETHER FLORIDA'S DEATH PENALTY STATUTE IS UNCONSTITUTIONAL UNDER *RING V. ARIZONA*

Finally, the Appellant claims that Florida's death penalty statute is unconstitutional under *Ring v. Arizona*, 536 U.S. 584 (2002). At trial, defense counsel preserved this issue through a pre-trial motion. The constitutionality of Florida's death penalty statute is a question of law reviewed by this Court de novo. *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002), *cert. denied*, 537 U.S. 1070 (2002).

In *Bottoson,* this Court declined to interpret the *Ring* decision as a finding that Florida's capital sentencing statute is unconstitutional, specifically noting that the "United States Supreme Court has reviewed and upheld Florida's capital sentencing statute over the past quarter century." *Bottoson*, 833 So. 2d at 695. Consistent therewith, the United States Supreme Court has held that "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [other courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling

its own decisions"). *Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477, 484 (1989). *See also Evans v. Sec'y, Dept. of Corr.,* 699 F.3d 1249, 1252 (11th Cir. 2012) ("when a Supreme Court's decision with direct application to a case appears to rest on reasons rejected in a more recent line of decisions, we must follow the directly applicable decision and leave to the high Court the prerogative of overruling its own decisions"). *See also Evans v. State/McNeil*, 995 So. 2d 933 (Fla. 2008).

Death sentenced defendants have consistently challenged this Court's decisions regarding the applicability of *Ring* to Florida's capital sentencing statute and, as the following excerpt demonstrates, these challenges have been consistently rejected:

> Peterson asserts that Florida's death penalty scheme is unconstitutional under *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), because *Ring* requires a jury determination of facts relied upon to increase maximum sentences in the capital sentencing context and Florida's death penalty statute does not provide for such jury determinations. Specifically, he asks that this Court reconsider its decisions in *Bottoson v. Moore*, 833 So.2d 693 (Fla.2002), and *King v. Moore*, 831 So.2d 143 (Fla.2002). We have consistently rejected claims that Florida's death penalty statute is unconstitutional. *See, e.g., Baker v. State*, 71 So.3d 802, 823–24 (Fla.2011), *cert. denied*, —— U.S. ——, 132 S.Ct. 1639, 182 L.Ed.2d 238 (2012); *Darling v. State*, 966 So.2d 366, 387 (Fla.2007); *Frances v. State*, 970 So.2d 806, 822 (Fla.2007). Peterson has not presented any argument that requires us to reconsider this precedent. Thus, we deny relief.

Peterson v. State, 94 So. 3d 514, 538 (Fla. 2012). Bargo also fails to present any argument that would require this Court to reconsider what is now relatively long

standing precedent on this issue. This claim does not merit relief.

ISSUE VI: WHETHER BARGO'S DEATH SENTENCE WAS PROPORTIONATE.

Bargo next claims his death sentence was disproportionate because of the substantial mitigation evidence presented during the penalty phase. However,

> "[this Court] review[s] every death sentence for proportionality regardless of whether the issue is raised on appeal. *England v. State*, 940 So. 2d 389, 407 (Fla. 2006); *see also* Fla. R.App. P. 9.142(a)(6). In reviewing proportionality, the Court follows precedent that requires that the death penalty be "reserved only for those cases where the most aggravating and least mitigating circumstances exist." *Terry v. State*, 668 So. 2d 954, 965 (Fla. 1996). Therefore, in deciding whether death is a proportionate penalty, the Court makes "a comprehensive analysis in order to determine whether the crime falls within the category of both the most aggravated and the least mitigated of murders, thereby assuring uniformity in the application of the sentence." *Anderson v. State*, 841 So. 2d 390, 407–08 (Fla. 2003) (citations omitted). Accordingly, the Court considers the totality of the circumstances and compares the case with other similar capital cases. *See Duest v. State*, 855 So. 2d 33 (Fla. 2003). This analysis "**is not a comparison between the number of aggravating and mitigating circumstances.**" *Porter v. State*, 564 So. 2d 1060, 1064 (Fla. 1990). **Rather, this entails "a *qualitative* review by this Court of the underlying basis for each aggravator and mitigator rather than a quantitative analysis**." *Urbin v. State*, 714 So. 2d 411, 416 (Fla. 1998).
>
> Further, in a proportionality analysis, this Court will accept the weight assigned by the trial court to the aggravating and mitigating factors. *See Bates v. State*, 750 So. 2d 6, 12 (Fla. 1999). We "will not disturb the sentencing judge's determination as to 'the relative weight to give to each established mitigator' where that ruling is 'supported by competent substantial evidence in the record.' " *Blackwood v. State*, 777 So. 2d 399, 412–13 (Fla. 2000) (quoting *Spencer v. State*, 691 So. 2d 1062, 1064 (Fla. 1996)).

Hayward v. State, 24 So. 3d 17, 46 (Fla. 2012) (emphasis added).

In support of his proportionality claim, Bargo cites to *State v. Crooks*, 908 So. 2d 350 (Fla. 2005), however, this case is easily distinguishable. In vacating Crook's death sentence, this Court noted the egregious abuse Crook endured as a child as well as his substantial mental health mitigation as follows:

> [W]e summarized Crook's mother's testimony that her first husband severely abused Crook, that Crook sustained head injuries at age four when he was **beaten with a metal pipe**, that subsequently Crook failed kindergarten and posed substantial discipline problems in the ten different schools he had attended "by the time he reached sixth grade and finally dropped out of school in eighth grade," and that by **age twelve Crook began using alcohol and drugs and huffing paint**.
>
> We also discussed the **substantial and unrebutted evidence of brain damage and other mental defects that the mental health experts related to the instant murder.** Our opinion recounted the testimony of Dr. David McCraney and other mental health professionals. Dr. McCraney opined that "Crook suffered from an impulse control disorder or organic brain syndrome affecting Crook's frontal lobe." He testified that Crook's school records indicated "that Crook was mildly mentally retarded." Dr. McCraney stated 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." Importantly, "Dr. McCraney concluded that the circumstances surrounding the homicide were consistent with his diagnosis of frontal lobe brain damage, stating, '[T]he events do appear to conform to this blind animalistic rage that's described with the orbital frontal syndrome.' "
>
> . . .Crook in 1994 as part of a social security disability determination and found that **Crook had "a full scale IQ of 66," which placed him in the "mild range of mental retardation."** [FN2] Dr. Kremper opined that Crook's frustration tolerance was severely limited, such that Crook was inclined to become physically aggressive with minor

> frustration. "Dr. Kremper also opined that Cook 'experienced auditory and visual hallucinations which appeared to result from extensive substance abuse and head injuries.' "
>
> > FN2. The social security evaluation included determinations that Crook was illiterate and totally disabled for employment purposes.

Crook, 908 So. 2d at 352-353.

In contrast to Crooks dreadful childhood, Bargo's friends and neighbors testified that the Bargos were great neighbors and were a normal family. (V41, R38, 54). The two families camped and fished together when Bargo was a child. (V41, R33, 38, 42, 58). Faith Christianson had good memories of the times spent with the Bargos. (V41, R44). Amanda Christianson occasionally babysat for the Bargo children. (V41, R95). Amanda found the Bargos to be a friendly, fun-loving, normal family. (V41, R99). Bargo was an active child—"clever at times." (V41, R96, 99). Contrary to the severe physical abuse suffered by Crook, Bargo reportedly lost privileges or was spanked when he misbehaved. (V41, R44, 97).

In contrast to Crook's brain damage, mental defects and borderline retardation, Bargo has normal intelligence[24] and personality/behavioral disorders. Although Bargo's expert, Dr. Berland, concluded that Bargo suffers "at most" from a

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[24] Bargo appeared to be the intellectual leader of his group of codefendants. Bargo testified that he was "paying the damn bills" and could live "pretty much wherever I want." (V38, R1232-3) Bargo also counseled them all about their drug use and Hooper about his temper and his work ethic. (V38, R1201, 1213, 1223-4).

schizoaffective disorder, he did not make a specific diagnosis by reference to the Diagnosis and Statistical Manual of Mental Disorders. (V43, R290, 296). Unlike *Crook*, Bargo's evidence of neurological and psychological illnesses was rebutted by the State. The State's expert, Dr. Prichard noted that although Bargo was diagnosed with ADD/ADHD, there was no mention of schizoaffective disorder or any psychotic mental disorder in Bargo's history. (V43, R342, 361). Dr. Prichard noted that Bargo was diagnosed with "oppositional defiant disorder," which is a behavioral disorder, "not a psychotic mental illness." (V43, R343).

Bargo's second expert, Dr. Wu, testified that Bargo suffers from "a complex partial seizure spectrum disorder, a type of partial complex epilepsy seizure," which was mistakenly diagnosed as ADHD. (V41, R131). However, Dr. Wu testified that the duration of these seizures would last between a few minutes to a few hours, although "it's not like [Bargo] would have one hundred percent loss of ability to regulate behavior." (V41, R140). Dr. Prichard noted that Bargo's new diagnosis of partial complex seizures was not mentioned in any of Bargo's medical records. (V43, R348). In Dr. Prichard's experience, patients diagnosed with this disorder typically demonstrate relatively complex activity—"typically ... has a seizure ... fall on the ground ...shaking ... don't have any control." Dr. Prichard testified that people with a complex seizure disorder exhibit strange behaviors that last for moments or short periods of time. "It's not like days of complex behavior."

(V43, R350-1). After reviewing all of the information and records pertaining to Bargo, Dr. Prichard opined that there was no indication Bargo "has a psychotic process that generated his behavior" in relation to the murder. "This was not a disorganized crime." In Dr. Prichard's opinion, Bargo is "psychopathic. Psychopathic[s] ... run the show, they do things their own way. They typically orchestrate crimes that pull other people involved. They're the head man ..." (V43, R351-2). Clearly, Bargo's case is drastically different than the physically abused, mentally disabled, illiterate defendant involved in *Crook.*

Bargo also claims that his sentence was disproportionate to the sentences of his other codefendants. *Initial Brief* at 84. However, this Court has held that disparate treatment between codefendants is justified where a specific defendant is more culpable:

> A codefendant's sentence may be relevant to a proportionality analysis where the codefendant is equally or more culpable. *See, e.g., Scott v. Dugger*, 604 So.2d 465, 468-69 (Fla.1992); *Hayes v. State*, 581 So.2d 121, 127 (Fla.), *cert. denied*, 502 U.S. 972, 112 S.Ct. 450, 116 L.Ed.2d 468 (1991); *Diaz v. State*, 513 So.2d 1045, 1049 (Fla.1987), *cert. denied*, 484 U.S. 1079, 108 S.Ct. 1061, 98 L.Ed.2d 1022 (1988). However, the record in this case supports the trial court's finding that Cardona was the more culpable of the two defendants. Thus, the disparate treatment is justified. *Rogers*, 511 So.2d at 535.

Cordona v. State, 642 So. 2d 361, 365 (Fla. 1994).

In the instant case, Bargo was clearly the most culpable defendant. Bargo planned Jackson's murder first by luring Jackson to Ely's house via text messages

from Wright falsely promising that Wright was interested in "working things out." Bargo then ambushed Jackson, wounded Jackson with gunshots, and ultimately subdued him with Soto and Hooper's help. Bargo wanted Jackson to "still be alive" when he was subsequently placed into a bathtub so Bargo could shoot him "face to face" so Jackson would know who was killing him. (V39, R1345). Bargo killed Jackson by shooting him in the face and then orchestrated the burning, dismemberment, and dumping of Jackson's body, having personally removed the teeth from Jackson's skull. (V39, R1344-5; V37, R1113). As this Court has repeatedly stated, "when the defendant is the shooter, the death penalty is not disproportionate even though a codefendant received a lesser sentence." *Armstrong v. State*, 642 So. 2d 730, 739–40 (Fla. 1994). *See also Mordenti v. State*, 630 So. 2d 1080 (Fla. 1994). Clearly, disparate treatment among the codefendants involved in this murder was justified.

Bargo's death sentence is proportionate to the revenge based shooting murder involved in *Martin v. State*, -- So.3d --, 2014 WL 4724564 (Fla. Sept. 24, 2014). (Death sentence found proportionate in shooting murder where prior violent felony, HAC and CCP aggravators found and one statutory and fourteen nonstatutory mitigators found). While only two aggravators were found in Bargo's case, "[t]his Court has repeatedly identified HAC and CCP as "two of the most serious aggravators set out in the statutory sentencing scheme." *Larkins v. State*,

739 So. 2d 90, 95 (Fla. 1999). Further, as this Court explained in *Martin*:

> We have also affirmed death sentences with less aggravation than the present case. For example, in *Heath v. State*, 648 So.2d 660 (Fla.1994), the trial court found two aggravating circumstances: "Heath was previously convicted of second-degree murder; and the murder was committed during the course of an armed robbery." *Id.* at 663 (footnote omitted). In addition to two nonstatutory mitigating circumstances, the trial court also found one statutory mitigating circumstance, that Heath was under the influence of extreme mental or emotional disturbance. *Id.* Similar to the present case, Heath also involved a codefendant that received a sentence of imprisonment. *Id.* This Court upheld Heath's death sentence, and it also expressly rejected Heath's challenge to the disparity between his death sentence and his codefendant's sentence of imprisonment. *Id. See also Hayes v. State*, 581 So.2d 121, 123–24 (Fla.1991) (upholding the death penalty where the trial court found two aggravating circumstances, one statutory mitigating circumstance, and nonstatutory mitigating circumstances including that the defendant "is of low intelligence" and "developmentally learning disabled"). Although the trial court in Martin's case found the existence of more nonstatutory mitigating circumstances than the trial court in *Heath*, we conclude that Martin's sentence is nonetheless proportional to *Heath* in light of the relatively slight weight given to Martin's mitigation.

Martin, 2014 WL 4724564, *12. Similarly, though the trial court found a substantial quantity of nonstatutory mitigation, the quality of Bargo's mitigation, in light of the relatively slight weight the trial court afforded such, is far outweighed by the weighty CCP and HAC aggravation involved in this case. This Court should find Bargo's death sentence proportionate.

ISSUE VII: WHETHER FLORIDA'S DEATH PENALTY STATUTE VIOLATES THE EIGHTH AMENDMENT'S PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT.

Bargo claims his death sentence is "inherently cruel and unusual punishment" and that the plain language of the Fifth Amendment guarantees the right to life: 'No person shall be held to answer for a *capital*, or otherwise infamous crime unless on a presentation or indictment of a Grand Jury…; nor shall any person be subject for the same offense to be twice put in jeopardy of **life** or limb;…nor be deprived of **life**, liberty or property, without due process of law.." *Initial Brief* at 86 (emphases in original). However, a plain reading of the above excerpt reveals that the framers of the Fifth Amendment recognized that our government could deprive a person of their life as long as the government afforded the person due process and did not placed the person at risk of a death sentence more than once for the same crime.

Regardless of this matter of constitutional interpretation, "[t]his Court has rejected the arguments that Florida's death penalty scheme fails to prevent the arbitrary and capricious imposition of death sentences by sufficiently narrowing application of the penalty and that it constitutes cruel and unusual punishment. *See, e.g.*, *Lugo v. State*, 845 So. 2d 74, 119 (Fla. 2003). *Smith v. State*, 126 So. 3d 1038, 1054 (Fla. 2013). Since Bargo's argument appears to address the general nature of the death penalty rather than any specific protocols or matters that may

render Bargo's death sentence unconstitutional in its application to Bargo, Bargo's claim lacks merit in light of the long standing precedent upholding the constitutionality of Florida's death penalty statute and his claim should be denied.

CONCLUSION

Based on the foregoing analysis, the State respectfully requests this Honorable Court affirm Appellant's convictions and sentences of death.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished by e-portal to the following: Valarie Linnen, Esq., vlinnen@live.com, P.O. Box 330339, Atlantic Beach, Florida 32233, on December 4th, 2014.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Times New Roman 14 point font.

Respectfully submitted and certified,

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